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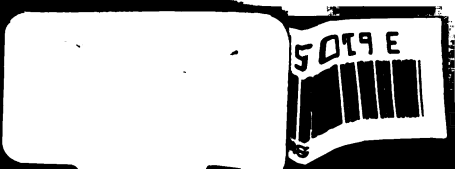
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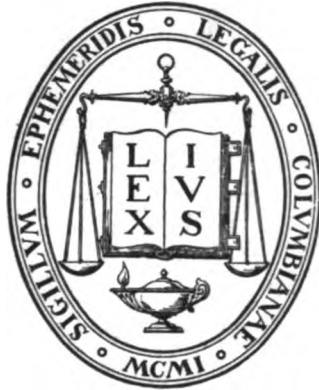




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No. 1

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## THE BURDEN OF LOSS AS AN INCIDENT OF THE RIGHT TO THE SPECIFIC PER- FORMANCE OF A CONTRACT.\*

THE effect of the destruction in whole or in part of the subject-matter of an executory bilateral contract, by the terms of which real property is to be conveyed and money paid therefor, either concurrently with, or subsequent to, the execution of a deed of conveyance, is to relieve the vendee from any obligation at law.<sup>1</sup> Nor is it possible to reach any other result, since the only enforceable right acquired at law by the vendee is a right to recover damages for a breach of the contract. The vendor remains the owner of the property with all the incidents of ownership. Since a vendee has at law no ownership of the property and no power of control over the same, a court of law cannot, for the purpose of throwing the loss upon him, treat him as if he were the owner. The same result must be reached in equity when because of the terms of the contract the element of control, on the part of the vendee, is equally wanting in equity. Therefore, in a contract where the vendor is at liberty to sell or not as he pleases, the vendee, having no rights, should not be subjected to any burdens. It is for this reason that the result reached in *Goldman v. Rosenberg*<sup>2</sup> should be followed in all jurisdictions. In that

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\* The writer regrets that circumstances, beyond his control, have compelled him to confine the citation of cases almost exclusively to those found in his *Cases on Equity Jurisdiction*.

<sup>1</sup> *Wells v. Calnan*, 107 Mass., 514.

<sup>2</sup> 116 N. Y., 78.

case, which was an action for an accounting between co-partners, it appeared that the defendants contributed, as a part of the capital stock, certain improved real estate, which they agreed to take back on the dissolution of the firm at the valuation at which it had been taken by the firm. The plaintiff, on the dissolution of the firm, sought to compel the defendants, notwithstanding the destruction of the buildings on the land, to take back the property at the valuation aforesaid, less the amount of the insurance collected by the firm. It was held that the firm must bear the loss. The contract for repurchase was clearly not for the benefit of the defendants but for the benefit of the firm. The defendants bound themselves to take; the firm did not bind itself to sell. The property was, therefore, to be treated as firm assets, subject to all the vicissitudes of the firm business. "The defendants," said the court,<sup>1</sup> "were not the owners, legal or equitable; they did not have an insurable interest in the premises." To have thrown the burden of ownership upon one who, at the time of the destruction of the buildings, had none of the benefits of ownership, either at law or in equity, would have been manifestly unjust.

Of course, if a vendee has not obligated himself to take, but has simply purchased the privilege of demanding a conveyance, neither law nor equity can convert his privilege into a duty and compel him to take. The question, therefore, of his bearing the loss, consequent upon his right to demand specific performance, can never arise.

Does the fact that equity will decree specific performance of a contract, whereby the one party has contracted to convey at a future day and the other to accept a conveyance, and to pay therefor at the time of the conveyance, or at some subsequent time, justify a court of equity in throwing upon the vendee a loss which at law will fall upon the vendor? What equity should do in these circumstances would seem to depend largely upon what equity has done in cases not presenting for consideration this particular question. If the rights of the parties to such a contract have been determined in equity on principles drawn from the law of trusts, rather than on the principles found in the

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<sup>1</sup> 116 N. Y., 78, 85.

law of contracts, then a reason may be found why a result should be reached in the case supposed differing from that reached at law. It is submitted that the principles of the law of trusts, not those of contract, have been invoked to reach the following results:

- I. The vendee can call for a conveyance of the property from a donee, or purchaser with notice.<sup>1</sup>
- II. The interest of the vendee can be assigned or devised.<sup>2</sup>
- III. In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance.<sup>3</sup>
- IV. Under a devise by the vendee of his real estate, the interest of the vendee passes.<sup>4</sup>
- V. In jurisdictions where a wife is given dower in equitable estates, the widow of the vendee is entitled to dower.<sup>5</sup>
- VI. The vendee has a right to require husbandlike conduct of the vendor in the management of the estate.<sup>6</sup>
- VII. The vendee is chargeable with the costs of improvements made by the vendor under compulsion of law.<sup>7</sup>
- VIII. The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct.<sup>8</sup>
- IX. An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estates held in trust by him.<sup>9</sup>
- X. A court of equity will not allow a widow to claim, as against the vendee, dower in land which the husband had, before his marriage, contracted to sell.<sup>10</sup>

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<sup>1</sup> *Daniels v. Davison*, 17 Ves., 433; *Lovejoy v. Potter*, 60 Mich., 95; *Moyer v. Hinman*, 13 N. Y., 180.

<sup>2</sup> *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 170.

<sup>3</sup> *Langford v. Pitt*, 2 P. Wms., 629.

<sup>4</sup> *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 337.

<sup>5</sup> *Bailey v. Duncan*, 4 Mon., 256.

<sup>6</sup> *Foster v. Deacon*, 3 Madd., 394; *Phillips v. Silvester*, L. R., 8 Ch. Ap. 173; *Clarke v. Ramuz*, L. R., 2 Q. B. (1891), 456.

<sup>7</sup> *King v. Ruckman*, 24 N. J. Eq., 556.

<sup>8</sup> *King v. Ruckman*, 24 N. J. Eq., 556.

<sup>9</sup> *Lysaght v. Edwards*, L. R., 2 Ch. Div., 499.

<sup>10</sup> *Oldham v. Sale*, 1 B. Mon., 76.

XI. The property is no longer liable for the debts of the vendor.<sup>1</sup>

Subject, apparently, to one exception only, the vendor has been treated by a court of equity as holding the title to the property as security for the payment of the purchase money, and his position has been likened to that of a mortgagee.<sup>2</sup> The one right lacking to make the position of the vendor and vendee in equity entirely analogous to the position occupied in equity by mortgagor and mortgagee, is the inability of the vendee to demand an accounting of rents and profits until the vendor is in default under his contract.

Equity has likened the interest of the vendee to that of the *cestui que trust* or mortgagee, for the reason that his claim, like theirs, is a claim *in personam* with reference to a specific *res* specifically enforceable in equity. As the jurisdiction of equity is purely *in personam*, to speak of the vendee, *cestui que trust*, or mortgagor as the owner in equity of the property, is to speak figuratively. The *cestui que trust* is given the rents and profits because of the fact that it would be manifestly unjust that a party having no beneficial interest in the property should enjoy the property at the expense of the beneficial owner. In the case of a mortgagor he is clearly entitled to the rents and profits, for the reason that the property is held by the mortgagee simply as security for a debt, and when he has received that, to secure the payment of which the title has been vested in him, it would be manifestly inequitable to allow him to retain the rents and profits, thereby enriching himself at the expense of the mortgagor. While the court of equity has likened the interest of the vendor to that of a mortgagee, for the purpose of working out certain just results, it is impossible for the court to confer upon the vendor a right to demand of the vendee a sum of money in excess of that which he has agreed to pay. The fact that the vendor has a *res* to which the vendee is in equity entitled, enables the court to liken the vendor's position to that of a mortgagee, to the extent that it is in interest of justice to do so. As the vendee holds no *res* for the ven-

<sup>1</sup> Moyer v. Hinman, 13 N. Y., 180.

<sup>2</sup> Lysaght v. Edwards, L. R., 2 Ch. Div., 499, 506.

dor, having given simply a promise in terms acceptable to the vendor, the sum agreed to be paid must be the limit of the amount of which equity can enforce payment. To compel the vendor to account for rents and profits, because of his possession during the time when he has no right to call upon the vendee for payment of interest, would be to give the vendee the enjoyment of both the purchase money and the real estate, and this would be manifestly unjust. To allow the vendor to retain the rents and profits, so long as he has no right to interest on the purchase-money, is therefore a necessity.

It is submitted that in these circumstances the absence of a right to demand rents and profits is no reason why a vendor should bear the loss, if but for the absence of that right the loss should be thrown on the vendee.

In the opinion of at least one writer,<sup>1</sup> the question as to the person upon whom the burden of loss should be thrown in the case under consideration, is to be determined by the fact of possession. If the vendor retains the possession he must bear the loss. If the vendee is given possession, although the vendor retains the title, the vendee must suffer the loss. The reason assigned for this distinction is that by giving possession to the vendee an intention has been indicated to hold the title simply as a security for the payment of a debt, and the transaction should then be regarded, by a court of equity, as if the deed of conveyance had been executed and a purchase-money mortgage given. It is submitted that if the court of equity is justified in treating the title as if it had passed in a case where the parties have manifested an intention that the title be retained simply as security, then the same result should be reached when that court, in the absence of any indication of the intention of the parties to the contract has, because of the rights conferred upon the vendee, treated the vendor as holding the property simply as security.

Another writer,<sup>2</sup> who supports the doctrine that the vendor must bear the loss in the case supposed, concedes that if the contract has been performed by the vendee by the payment of the purchase money the vendee must bear the

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<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 120.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 2 H. L. R., 241, n. 1.

loss consequent upon the destruction of the property prior to the time when he is entitled to a conveyance. The reason assigned by him is that, by the payment of the money, the vendor has become a trustee for the vendee. It is not probable that the learned writer would contend that the vendor in that case is a real trustee as distinguished from a constructive trustee. At law the relation was in its inception a contractual one, and did not cease to be such by the payment of the purchase money. All that the vendor has done is to receive the purchase-money in accordance with the terms of the contract. The result is that the vendee has an absolute right, where before his right was conditional. But it is the power of control, and the rights conferred upon the vendee on the making of the contract, that gives him his standing in equity, not the simple payment of money. But why should a vendee suffer a loss who has paid for that which he has not received, when if his contract had not required a payment in advance, he could have refused to pay, because of the impossibility of the vendor giving him that for which he was to pay? In point of equity, a man who is paid for that which the other party has contracted to give, and cannot give, would seem to be in at least as good a position as one who has failed to pay for that which he has not received. If it is inequitable to compel a vendee to pay for that which the vendor cannot convey, it would seem equally inequitable to permit the vendor to keep that which has been given to him in exchange for something which he cannot give.

In each case, if the question is approached as a question of contract, pure and simple, something is being given, or has been given, for nothing. In either case, if it is to be approached as a question of trust, the equity would seem to arise, not from the payment of the purchase-money, but from the equitable right acquired because of the doctrine of specific performance of contracts.

The same writer concedes<sup>1</sup> that if the loss happens after the time for the performance of the contract, and at a time when, barring the loss in question, the vendor would be entitled to specific performance, though the vendor's rights at law are gone, the loss must fall on the vendee. An illus-

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<sup>1</sup> Langdell, *A Brief Survey of Equity Jurisdiction*. 1 H. L. R., 374-75.

tration of such a case would seem to be the case where a vendor is in default as to the time of performance, but in circumstances when, notwithstanding his default, he can enforce specific performance. Clearly, in this case, a court of equity is enforcing a right not legal in its character, as no right exists at law, and it seems difficult to see why a vendee, not in default, should have the loss thrown upon him because the loss happened after the time for the performance, when had the loss happened before such a time no such liability would have been incurred.

The explanation given for this result is that "when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened." In assigning this reason in justification of such a result, the writer seems to have lost sight of the fact that the doctrine of relation is a fiction that can only be invoked in order to promote justice, *i. e.*, in order to prevent some injustice or some inconvenience that would otherwise arise.<sup>1</sup>

If, then, justice requires the doctrine of relation to be invoked, in order that the loss may be thrown upon the vendee, it must be for the reason that it would be unjust not to throw the loss on him. But why should a party, not in default under his contract, bear a loss because it happens after the time for performance, when he should not have been compelled to bear the loss if it had happened prior to that time?

The same writer<sup>2</sup> urges as an objection to throwing the loss upon the vendee in the case under consideration, that, to do so, it is necessary to have the performance relate back to the time when the contract was made, and that such relation cannot be justified, as it was the intention of the parties that the conveyance should be executed on a day subsequent to the making of the contract and to the time of loss. This objection is undoubtedly fatal if the doctrine of relation must be invoked. But it is submitted that, in view of the position taken in equity as to the vendee's rights,

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<sup>1</sup> Langdell, *Contracts*, 2 Ed., 8.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 1 H. L. R., 376.

there is no greater reason for invoking such a doctrine in the case supposed, than there would be to invoke the doctrine of relation in the case of a mortgagor or mortgagee, if the question came up as to whether the mortgagor or the mortgagee should bear the loss, consequent upon the destruction of property, while in the possession of the mortgagee. If the loss is to be thrown upon the vendee it is because he is in equity substantially the owner of the property, and, as a consequence, justice requires that having the benefits he should bear the burden of ownership. It is because of his equitable, not his legal, ownership that the vendee should bear the loss.

It has also been suggested that many of the results reached in this class of cases depend upon the doctrine of equitable conversion.<sup>1</sup> It is said that equitable conversion is a doctrine resorted to by a court of equity to give effect to the intention of the owner of property.<sup>2</sup> In other words, that the doctrine of equitable conversion depends not upon "the contract *qua* contract \* \* \* but the contract as expressing the intention of one of the parties to it with reference to a matter within his exclusive control," and, therefore, this doctrine should not be resorted to, save for the purpose of determining the rights of the representatives of a party to a contract as between themselves. The phrase *equitable conversion*, it is submitted, is a form of speech used to express a result which has been reached in a certain class of cases in the interest of justice. It does not lead to, but represents, results reached. It is just in a given case that realty should be treated *as if it were* personalty, or personalty *as if it were* realty, and a court of equity so treats it. The reason why it is just will vary with the facts presented. It may be because of the intention of a deceased owner of property, or for other reasons.<sup>3</sup> It seems quite unnecessary to resort to this doctrine to justify the results that have been reached in considering the rights and liabilities arising in equity when a contract has been made for the purchase and sale of real estate.

When A contracts to sell real estate to B, and B con-

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 117.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 1 H. L. R., 378-380.

<sup>3</sup> *Lysaght v. Edwards*, L. R., 2 Ch. Div., 499, 507.



tracts to buy, A has acquired a right and assumed an obligation. He owns real estate which a court of equity will compel him to convey to B. If he dies the land descends to his heir for the reason that it is real estate and not personalty. When a court of equity compels the heir to hold for the vendee, it is because a donee of property cannot occupy a better position with reference to the property than the donor, and not because it is to be treated as personalty. Indeed, it is because equity recognizes that the property is real estate, that the heir of the vendee, not the personal representative, is entitled to call for a conveyance. When equity says that the widow of a vendor, who was under a contract to sell the estate at the time of his marriage, will not be allowed to claim dower, it is not because equity regards the property as personalty, but because of the trust obligation relating to the property. The rights acquired by the vendor are personalty, and, as such, go to his personal representatives on his death. A result concurred in by equity.

It has been urged, as an objection to the doctrine, that the loss should be thrown upon the vendee, that, in a doubtful case, to let a loss lie where it falls saves litigation.<sup>1</sup> It is undoubtedly true that if a court cannot satisfy itself, that a plaintiff is entitled to the relief which he seeks, it should not give a decree in his favor. To do so would be manifestly unjust to a defendant against whom the court is not prepared to say the plaintiff has established a right. That the court should leave the loss where it falls, to save litigation, is a proposition which, standing alone, should not receive assent, and is immaterial if the court is unable to say that the plaintiff has established a right.

It has been further suggested that it is wiser to have the party in possession of the property care for it at his peril; that to throw the loss in such a case on the vendee is to tempt the vendor to be wanting in the exercise of that care which he would otherwise use.<sup>2</sup>

In considering this objection, it must be remembered that, if the loss is occasioned by the negligence of the vendor, and that fact can be established, the loss will be borne by him, and not by the vendee. In view of this fact,

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<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

<sup>2</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

unless the justice of the case requires the vendee to bear the loss, the necessity of throwing the loss upon the vendor in order to insure proper care on his part does not seem so great as to require injustice to be done to a careful vendor. That negligence may be a difficult thing to prove is hardly a reason for throwing a loss upon a man who, in the absence of negligence, ought not, in point of justice, to be held liable.

The practical advantage, whatever it may be, of throwing the loss on the vendor to prevent the subrogation of an insurer to the rights of a vendor against a vendee,<sup>1</sup> does not seem so great as to require injustice to be done the vendor.

It has been urged that the vendee should not be treated as enjoying the *jus disponendi*,<sup>2</sup> unless he can, under the recording acts, give constructive notice of his equitable ownership. The reason assigned for this position is that, in the absence of such a right, the vendor has it in his power to deprive the vendee of his interest by conveying the property to an innocent purchaser. One would hardly think of requiring the trustee of an express trust to indemnify the *cestui que trust* against the loss of trust property in a case where the trustee has it in his power to defeat the trust by conveying to an innocent purchaser for value, and where, therefore, a dishonest trustee might profit at the expense of a *cestui que trust*. Why, then, should an honest vendor suffer a loss, because, had he been dishonest, he might have defrauded the vendee of his rights, leaving him only a claim for damages?

Rightly or wrongly—rightly, the writer thinks—the vendee in the case under consideration has been given in equity rights analogous to those of the *cestui que trust*, with substantially the benefits of equitable ownership. As a necessary consequence, in the opinion of the writer, he must bear, as one of the burdens of ownership, the loss involved in the destruction of property, in whole or in part, without the fault of the vendor. Such is the result reached in England and in the majority of the jurisdictions in this country.<sup>3</sup>

WILLIAM A. KEENER.

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

<sup>2</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 119.

<sup>3</sup> *Paine v. Miller*, 6 Ves., 349; *Costellain v. Preston*, L. R., 11 Q. B. D., 380; *Smith v. Hayles*, 12 Vict. L. R., 237; *Johnston v. Jones*, 12 B. Mon., 326; *Brewer v. Hubert*, 30 Md., 301. See, however, *contra* *Gould v. Murch*, 70 Me., 288; *Thompson v. Gould*, 20 Pick., 134. The decision in *Wells v. Calnan*, 107 Mass., 514, is not in point as the action in that case was at law for a breach of contract in not accepting a conveyance.

## THE HISTORY OF THE LAW OF NATURE : A PRELIMINARY STUDY.\*

*Its Continuity.*—The term "Law of Nature," or natural law, has been in use in various applications ever since the time of the later Roman Republic. Their variety and apparent diversity have tended to obscure the central idea which underlies them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law. Such a principle, under the name of reason, reasonableness, or sometimes natural justice, is fully recognized in our own system, but the difference of terminology has tended to conceal the real similarity from English lawyers during the last century or more. The neglect of mediæval learning which followed the Renaissance and the Reformation has also caused us to forget that the Law of Nature has a perfectly continuous history down to the date of its greatest and most beneficent achievement—one might almost say its apotheosis—in the foundation of the modern Law of Nations by Grotius. Much that has been written on this subject, even by eminent authors, assumes or suggests that Grotius revived for his own purposes an almost dormant conception of the Roman lawyers. In fact, the Law of Nature, as Grotius found it, was no mere speculative survival or rhetorical ornament. It was a quite living doctrine, with a definite and highly important place in the mediæval theory of society. What is more, it never ceased to be essentially rationalist and progressive. Modern aberrations have led to a widespread belief that the Law of Nature is only a cloak for arbitrary dogmas or fancies. The element of truth in this belief is that, when the authority of natural law was universally allowed, every disputant strove to make out that it was on his side. But such an endeavor would

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\*For the privilege of the American publication of this article we are indebted to E. Manson, Esq., Editor of the *Journal of the Society of Comparative Legislation*.

obviously have been idle if the Law of Nature had meant nothing but individual opinions. I now propose to give a summary view of the origin and development of the doctrine. The facts are not open to doubt, and any current errors are due to pure oversight rather than to misconstruction.

*Aristotle.*—Natural law, as conceived by mediæval scholars, was derived partly from the Aristotelian distinction of natural and conventional justice, partly from the Latin exposition, led by Cicero, of the same idea in its later Greek forms, and partly from the still later special adaptation of it by the classical Roman jurists. The distinction was not altogether new in Aristotle's time; for the present purpose, however, the celebrated passage in the fifth book of the *Nicomachean Ethics*<sup>1</sup>—not from Aristotle's own hand, but certainly Aristotelian in substance—may be taken as the fountain-head. Justice, as a necessary element of the State (*τὸ πολιτικὸν δίκαιον*), is divided into natural (*τὸ μὲν φυσικόν, naturale*) and conventional (*τὸ δὲ νομικόν, legale*). Rules of natural justice are those which are universally recognized among civilized men. Rules of conventional justice deal with matters which are indifferent or indeterminate until a definite rule is laid down by some specific authority. Such are all rules fixing the amount of fines or other money payments. The rule of the road may furnish as good a modern example as any. Reason suffices to tell us that some rule is desirable on frequented roads, but whether we shall take the right or the left hand can be settled only by custom or legislation; and in fact the rule differs in different countries. Thus far Aristotle might seem to be merely noting the fact that some principles of social conduct are admitted everywhere, or at least wherever there is any settled government. But the Aristotelian use of the term "Nature" goes beyond this; it implies the conception of a rational design in the universe, which is manifested, though never perfectly realized, in the material world. This last qualification is important. Aristotle expressly guards himself against asserting that the rules of

<sup>1</sup> C. 7. This is one of the Eudemian books. The Latin equivalents given are those used by St. Thomas Aquinas, from the literal version prepared under his direction.

natural justice, as actually found in human society, are perfectly constant. General uniformity is enough to show that they exist, as the right hand is truly said to be the stronger, although there are left-handed people.

*The Stoics.*—The Stoics emphasized the teleological and ethical aspects of the Peripatetic doctrine, and fixed on the term "Nature" in this connection the special meaning of the constitution of man as a rational and social being. Every creature has its own nature and its own appropriate functions, and for man—whose nature is to be a citizen—the Law of Nature is the sum of the principles, founded in human nature, which determine the conduct befitting him in his rational and social quality. No term answering to the Latin *ius gentium* is known to occur in Greek philosophy, but the later Stoics at any rate spoke of *νόμος φυσικός* (which Aristotelian usage would not allow), and the original Aristotelian dictum was current in the Middle Ages in the form "*Ius naturale est quod apud omnes homines eandem habet potentiam.*"

*The Roman Jurists.*—As to Roman usage, it appears that *ius gentium* was old popular as well as legal Latin, and meant the common law or usage of mankind—the rules which, in fact, everybody recognizes.<sup>1</sup> This is very near the *φυσικόν δίκαιον* of the Greeks, taken on the practical and directly observable side. *Lex naturalis* or *natura, ius naturale*, came in, as deliberate translations of the Greek term, in the last period of the Republic. They must have been neologisms in Cicero's time, for in his earliest work, the *De Inventione*, as in that of the anonymous *Auctor ad Herennium* whom he follows, the idea is found, but is expressed by periphrasis. The law derived from Nature, as there set forth, is identical, as might be expected, with the morality of a high-minded Roman gentleman.<sup>2</sup> We are not concerned here with the technical history of *ius gentium* as part of the Roman system of law, but only with the reason given for its adoption. Obviously no positive authority

<sup>1</sup> Fortescue, *De Laudibus Legum Angliæ*, c. 16.

<sup>2</sup> Nettleship, *Contributions to Latin Lexicography*, s. v.

<sup>3</sup> *De Invent.* 2, 53, s. 161: "*Natura ius est quod non opinio genuit sed quaedam innata vis inseruit: ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem.*"

could be assigned; and ancient Roman lawyers were no more willing than modern English ones to admit frankly that they were innovating on grounds of convenience. The Greek doctrine of the Law of Nature furnished exactly the ideal foundation which was wanted, and the classical jurists, perhaps with more aid from lost Greek philosophical works than we can now trace, proceeded to identify *ius gentium* with *ius naturale* for the purposes of legal science.

"*Ius Naturale*" and "*Ius Gentium*."—Strictly speaking, *ius naturale* should signify the rules of conduct deducible by reason from the general conditions of human society; *ius gentium*, so much of those rules as is actually received and acted upon among all civilized people. We have already seen that not even philosophers expected natural justice to be completely realized in this world, nor can I find any evidence that either philosophers or lawyers believed it ever had been, notwithstanding the modern use of such expressions as "the lost code of Nature" with reference to the Roman doctrine. If they ever felt tempted to connect the Law of Nature with the fables of a golden age, they were wise enough to resist the temptation.

Thus a distinction between *ius naturale*, the ideal to which actual law and custom could only approximate, and *ius gentium*, the measure of the practical approximation at a given time, was quite warrantable, if not positively required from a theoretical point of view. Such a distinction, however, is but seldom made by the Roman lawyers, and then in exceptional matter, such as the question of slavery;<sup>1</sup> and modern Romanists appear still unable to agree whether passages of this kind represent a received doctrine or individual speculations. There is no doubt that the terms were treated as synonymous in ordinary cases, and it is not difficult to suppose that in such cases the exceptional ones were not present to the minds of the writers, or the tacit exception of them was left to the reader's intelligence.

The compilers of Justinian's *Institutes* adopted from

<sup>1</sup> The contrast is most strongly put in a fragment of Tryphoninus, D. 12. 6. *De Conduct. Indeb.* 64: "Libertas naturali iure continetur, et dominatio ex gentium iure introducta est." It hardly needs pointing out that this is not an Aristotelian view. St. Thomas Aquinas tries to reconcile the earlier and later philosophers by a distinction of great ingenuity. See *Secunda*, qu. lvii, art. 3.

Ulpian a phrase extending the Law of Nature to all living creatures: "*Ius naturale est quod natura omnia animalia docuit.*"<sup>1</sup> This would seem to be merely a piece of over-ambitious generalization taken from some forgotten Greek writer, perhaps a rhetorician and not a philosopher. It is quite contrary to the Stoic conception of the Law of Nature, where Nature undoubtedly means the reason of the universe as exhibited in the specific moral and social character of man, and "following Nature" means realizing, so far as possible, the ideal of human nature; so that the difference between man and other animals is more important than the resemblances. Ulpian's unlucky phrase is alone in the *Corpus Iuris*; Ulpian himself makes nothing of it beyond saying that rudimentary family institutions may be ascribed to irrational animals, and there is no sign of the notion having had any influence in Roman law. Nevertheless, this passage, having been put in a conspicuous place at the opening of Justinian's *Institutes*, and therefore speaking with the highest authority, has given infinite trouble to commentators. Most mediæval writers felt bound to accept—with more or less qualification, according to their boldness and ingenuity<sup>2</sup>—the threefold classification of *ius naturale*, the rules or instincts common to all animals; *ius gentium*, the rules common to all mankind; and *ius civile*, the particular law of this or that commonwealth.

*William of Ockham's Classification.*—William of Ockham, one of the boldest, propounded a classification altogether independent of Ulpian. *Ius naturale*, he says, may be taken in three senses: (1) The universal rules of conduct dictated by natural reason; (2) rules which would be accepted as reasonable, and therefore binding, in a society governed (or in any society so far as governed) by natural equity without any positive law or custom of human ordinance; (3) rules which may be justified by deduction or analogy from the general precepts of the Law of Nature, but, not being in fundamentals, are liable to modification by positive

<sup>1</sup> D. 1. 1. *De Iust. et Iure*, 1, 3.

<sup>2</sup> There is some good criticism in Ægid. Rom. *De Regimine Pr.* III. ii. c. 25. (This book is often cited without the author's name; care is therefore necessary to distinguish it from the other work, partly by St. Thomas Aquinas, of like title.)

authority.<sup>1</sup> The "secondary Law of Nature" of later books appears to cover William of Ockham's second and third heads, but may generally be referred to the third. That which modern writers since Rousseau have commonly called the Law of Nature without qualification is nothing else than a one-sided development of the "secondary Law of Nature" as it was understood before the scholastic terminology was forgotten. But we must return to the normal process of mediæval thought on the main lines of the subject.

*Influence of the Revival of Learning.*—About the beginning of the twelfth century the revival of Latin learning, which is not unjustly called the "Lesser Renaissance," was fully as active in legal and political speculation as in other directions. The more exciting and more easily intelligible controversies of the sixteenth century have obscured the importance of this movement for latter-day readers. John of Salisbury may be taken as its typical English champion. It culminated, a century and a half later, in Dante. When we call it a revival of Latin learning, we include not only the study of Roman literature and the Roman law, but the study of Greek antiquity and philosophy so far as accessible through Latin. Indeed, there is reason to think that knowledge of Greek, in the thirteenth century at any rate, was not so very rare as has been commonly supposed. We have to remember that, for the mediæval history of the Law of Nature, Aristotle is not less important than Justinian, and Cicero's authority does not come far behind.<sup>2</sup> The heathen philosophers had been so much quoted and

<sup>1</sup> Dial. pars. III., tr. ii. l. 3, c. 6, at p. 932, in Goldast, *Monarchia*, tom. ii. There is an express claim of originality; the Student says: "Istam distinctionem iuris naturalis alias non audivi."

<sup>2</sup> See the Ciceronian passages collected in K. Hildenbrand, *Geschichte u. System der Rechts- u. Staatsphilosophie*, i. 564. (This volume seems to be all published.) The fragment of the *De Republica* preserved by Lactantius probably had more influence than any one passage in the jurists. As it is constantly referred to, it may be convenient to give the leading phrases here: "Huic legi nec abrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest: nec vero aut per senatum aut per populum solvi hac lege possumus; neque est quærendus explanator aut interpres eius alius: nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac," etc. (*De Rep.*, III., 22.) The use of the word "lex" involves the idea of rational design, and is justified by it, otherwise it would not be Latin.



approved by Fathers of the Church that they stood in the eyes of mediæval scholars on almost as high a level of sanctity as an orthodox emperor. When the age of chaos was past, and the lawyer and the statesman, after many generations, once more had the means of being humanists, the Law of Nature presented itself with twofold and threefold claims to allegiance. Its authors and vouchers carried a weight second only to that of the law of God as declared by the authority of the Church, evidently the Law of Nature could not be left out in any systematic discussion of human conduct. Any serious attempt to disparage it was no less out of the question. Even the Church could not afford to set herself against Aristotle, Cicero, and Justinian. The Law of Nature was too firmly in possession to be evicted. Yet the Church had to maintain her supremacy, as custodian of the divine law, in matters of faith and morals.

*The Law of Nature identified with the Law of God.*—Only one way was possible. The Romans had already identified their *ius gentium* with the Law of Nature; the process must be carried a step farther by identifying the Law of Nature with the law of God. Philosophers had already used language which pointed that way. The step was taken in the twelfth century, by the author or authors of the *Decretum* of Gratian, and with a thoroughgoing boldness which almost deserves the name of genius.<sup>1</sup> At the very head of the *Decretum*, therefore at the very head of the body of Canon Law as since collected, we read that the Law of Nature is nothing else than the golden rule, comprised in the Law and the Gospel, which bids us do as we would be done by, and forbids the contrary. It is supreme over all kinds of law by antiquity and dignity; it is immutable; it prevails over both custom and express ordinance. Here, it would seem, English lawyers must be content to find the origin, both of the maxim, still received, that a custom cannot be

<sup>1</sup> I have looked into the best known manuals of Canon Law before Gratian (Regino of Prüm, Burchard of Worms, Ivo of Chartres) with the aid of the excellent indices to them in Migne's *Patrologia*, rather expecting to find the doctrine in an earlier stage, but have found nothing like it. Apparently Gratian makes a wholly new departure. There is reason to believe that the *Decretum* was strongly influenced by Abelard (see Thaner, *Abelard und das canonische Recht*, Graz, 1900); but whether there be anything to our immediate purpose in Abelard I must for the present leave to be verified by better mediævalists than myself.

good if it is contrary to reason, and of the doctrine—now rejected but current (though never put in any effectual practice) in the sixteenth and down to the eighteenth century—that a statute may be held void for being repugnant to reason or “common right.” The Law of Nature, however, is not absolutely co-extensive with the law of the Church or with the rules revealed in Scripture. For even revealed precepts, though of unquestionable authority, may and often do deal with matters not fundamental in themselves, but appertaining to ceremonial and positive regulation. It is assumed, rather than directly laid down, that the Church is the authentic exponent and interpreter of natural law. The assumption, however, is obviously required by reasons of discipline. It would never do for bishops and archbishops to claim practical independence under pretense of following the rule of natural reason at their own discretion. But the Law of Nature in the hands of an ultimate authority may be an effective solvent in many cases. A bishop who obstinately relies on a local custom against the general usage of the Church will find himself kicking against the pricks, not merely of official superiority, but of a law which he must needs recognize as paramount.<sup>1</sup> Truth before custom: had not Augustine said it? Thus the Law of Nature, as the eldest branch of the divine law, goes hand in hand with the no less divine authority of the Church to judge all the earth and do right. Such is, in outline, the system which has never been substantially departed from by orthodox canonists. It is true that the *Decretum* of Gratian has not, in Canon Law, the same binding force as the later Decretals.<sup>2</sup> But if authority were wanting to Gratian's enthronement of the Law of Nature, it was amply supplied by Aquinas, who set his stamp on the doctrine in the next century.

*St. Thomas Aquinas.*—The relation of natural law to divine law in general is more fully defined by St. Thomas; they are not substantially different, but natural law is divine law so far as revealed through the medium of natural reason

<sup>1</sup> If any one should think the reinforcement superfluous, let him remember that the discipline of the Church in the middle of the twelfth century was not what it is now, or what it had become even a century or two later.

<sup>2</sup> See F. W. Maitland in 2 *Encycl. Eng. Law*, 356, 357.

"participatio legis æternæ in rationali creatura."<sup>1</sup> This identification was carried over by the glossators into the teaching of Civil as well as Canon Law. Thus Azo explains Ulpian's *natura*, in the perplexing dictum already mentioned, by *id est ipse Deus*.<sup>2</sup> It is needless to dwell farther here on the passages of St. Thomas Aquinas touching the Law of Nature, as they have been cited by recent English writers (Professor Holland and others) and are comparatively well known. Mediæval writers often speak for brevity's sake of divine law, without qualification, when they mean specifically revealed rules of conduct, and of positive law when they mean positive or conventional rules of human ordinance. Hence a current division of all law into divine, natural and positive, where the first and last of these epithets must be understood to be used in the compendious manner just explained, and not to imply ignorance or doubt of the propositions, perfectly well known to the writers, that all natural law is divine, and some divine law is positive.<sup>3</sup>

"*Deus Finem Naturæ Vult*."—The full adoption and glorification of natural law by the *Decretum* of Gratian was, as above said, a master-stroke of policy. We may doubt whether it aimed so high as securing supremacy for the Church over the temporal power, or making the Church the arbiter in questions of secular government. Designs of that magnitude were then hardly formed. The Church was clearly bound to uphold the fundamentals of Catholic faith and morality against all earthly powers; we need not suppose that Gratian intended to go farther. At all events, there was no way of making political speculation wholly subordinate to theology. It was not long before ingenious controversialists discovered that the supremacy of the Law of Nature was a double-edged weapon. For the Law of Nature, by its very definition, was a rule of life

<sup>1</sup> *Prima Secundæ*, qu. xci., art. 2.

<sup>2</sup> See F. W. Maitland, *Bracton and Azo* (Seld. Soc., 1895), at pp. 32, 33.

<sup>3</sup> Selden's brief remarks in his *Table Talk*, s. v. *Law of Nature*, seem to ignore these distinctions. Denial of any natural law apart from a specially sanctioned revelation appears to be the substance of the dictum as reported. But this would make Selden more Hobbiist than Hobbes himself, and we cannot suppose that he would have expressed his considered opinion in such terms.

and society discoverable by human reason apart from any special revelation or the decision of any particular authority. When discovered, again, it was admitted to be absolutely binding. Natural law could not be in conflict with divine law, for it was part of the divine law. The intentions of Nature, as philosophy calls them, are nothing else than the intentions of the Creator. As Dante puts it:<sup>1</sup> "Manifestum est quod Deus finem naturæ vult." So William of Ockham: "Omne autem ius naturale est a Deo qui est conditor naturæ."<sup>2</sup> Whatever, therefore, reason can establish as part of natural law may be used as a touchstone for propositions enounced by any particular person or body and purporting to be deduced from the specially revealed part of God's law. Such propositions, if contrary to natural law, must be erroneous. Nor could theologians or official persons of any kind claim a monopoly of natural reason. Even if the Church were the ultimate interpreter, the authentic voice of the Church could be found only in a General Council; for in the Middle Ages the infallibility of the Pope, so far from being a dogma, was barely allowed to be a plausible opinion. Thus a wide field of speculation was kept open, and guarded by the Law of Nature, through the action of the Church herself. Not even a William of Ockham could think of going behind the notorious elements of orthodox belief; and, indeed, the Law of Nature could obviously have little application, if any, to purely theological argument. But, apart from the fact that some dogmas, or opinions which have since become dogmas, were still plastic, there was much to be done without any such extreme adventure. There were a great number of questions interesting to both Church and State, such as we now call constitutional, which remained legitimately open. One might not derogate from the law of God as expressed in Scripture and laid down by the Church. But in the case in hand the revealed law of God might be wholly silent, or it might be ambiguous, or authentic texts admitted or alleged to be applicable might be capable of widely differing interpretations. When once there were plausible grounds on either side and no decisive authority, the Law of Nature—

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<sup>1</sup> *De Monarch.*, 3, 2.

<sup>2</sup> *Dial. III.*, ii, 3, c. 6, at p. 934, in Goldast, *Monarch.*, t. ii.

like the king's ultimate power of doing justice in default of an adequate ordinary jurisdiction—could always be invoked by way of supplement. It might furnish a rule where no rule had been declared, or might guide interpretation where the application of the rule was not certain. Moreover, as we have pointed out, it was not free to a mediæval disputant to traverse the authority of the Law of Nature itself, but only to deny the correctness of the adversary's formulation or application of its rules in the particular case.

*Pope and Emperor.*—A weapon of controversy so tempting and lying so ready to hand could not fail to be freely and eagerly wielded. In fact, we find the Law of Nature, through the Middle Ages and down to the Renaissance, called in aid of many and various contentions, sometimes on the side of the opinions most favored in high places, but as often on the contrary. Most chiefly it was an inexhaustible topic in the standing controversy for dominion between the Empire and the Papacy. Rival claims to supreme jurisdiction, urged with abundance of plausible authority on behalf of potentates who owned no common earthly superior, furnished exactly the field in which the Law of Nature might be used with brilliant dialectic effect as a *deus ex machina*. So the champions on either side constantly endeavored to turn the scale by demonstrating to their own satisfaction that the Law of Nature supported, as their case might be, the pope or the emperor. Imperialist arguments were not wanting in boldness. William of Ockham maintains that the people of Rome have probably a divine, certainly a natural, right to elect their own bishop, and appeals with confidence to natural reason to show that a heretical or otherwise incorrigibly evil pope may lawfully be deposed.<sup>1</sup>

On all hands it was admitted, even by extreme partisans, that both pope and emperor were subject to the Law of Nature, though it might be and was urged that one or the other of them was more likely to form a correct judgment

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<sup>1</sup> Goldast, *Monarch*, ii. 568, 934. William of Ockham's dialogue is printed, along with Marsilio's *Defensor* and other Imperialist works, in this enormous volume. I do not know of any more convenient edition as easily accessible.

as to what it dictates were. As the champions of the Curia suggested or assumed that the official head of the Church was the best exponent of natural law, so the Imperialists maintained that it was the safe course to follow the emperor's judgment in case of doubt, and rash to dispute it unless it were so contrary to settled principles as to be manifestly erroneous.<sup>1</sup> English lawyers accustomed to weighing the relative authority of decisions will readily see how natural and indeed inevitable these positions were in controversy where jurisdiction was the principal or only matter really in difference.

"*Communis Utilitas*."—It was no less inevitable that the appeal to the Law of Nature as the ultimate ground of decision between the conflicting claims should often become indistinguishable, to modern eyes, from a pretty frank appeal to expediency. We find even the language of modern utilitarianism anticipated, for *communis utilitas* is a quite current term. If Bentham had known what the Law of Nature was really like in the Middle Ages, he would have had to speak of it with more respect. It has been pointed out before now that in any case utilitarianism is just as much a system of natural law as any other dogmatic system of ethics, or politics. Indeed the political principles of the Imperialist doctors come very near to the well-known theistic form of utilitarianism, according to which utility is the test of right conduct because God wills the happiness of his creatures.

*Practical Application.*—The Law of Nature being for the most part an engine of dialectic, we have no cause to be surprised at not finding much mention of it by name in official and authoritative documents. On occasion, however, it might serve the purpose of a prince who wished to assign imposing reasons for a bold reform without derogating from his own supremacy. Thus Philip the Fair of France in 1311 rested the enfranchisement of the bondmen on the Valois domain upon freedom being the natural birthright of man, and brought in the common profit of the realm (following the utilitarian tendency noted above) as a secondary motive. "*Comme créature humaine qui est formée à*

<sup>1</sup> "Error principis probabiliter ius facit"; William of Ockham, Goldast, *op. cit.*, at p. 924.

l'image Nostre Seigneur doie generalmente estre franche par droit naturel et en aucuns pays de cette naturelle liberté ou franchise par le jou de servitude qui tant est haineuse soit si effaciée et obscurcie . . . nous meus de pitié pour le remede et salut de nostre ame et pour consideration de humanité et de commun profit," etc.<sup>1</sup> The example was followed by Philip's son, Louis Hutin. A high authority has seen here a misunderstanding or misapplication of the Roman dictum, "Omnes homines natura æquales sunt."<sup>2</sup> But in the first place it is not clear that there is any reference to Roman secular law. The tone of this preamble is more ecclesiastical than civil, and the Church had always stood for freedom and favored manumission. Again, it was considered perfectly fair throughout the Middle Ages to apply any text of authority in any sense it could be made to bear, without regard to what the original historical sense might have been. The more authoritative the text, the more applications were presumably to be discovered in it; and the most far-fetched use of a text is no proof that the writer had misunderstood its primary meaning. Besides, if Roman texts are in question, there are express dicta in the *Digest* to the effect that the Law of Nature does not recognize slavery, and it would be enough to rely on these without saying (as the ordinance does not say) anything about equality. I do not know whether it was open to a French lawyer in the fourteenth century to argue that a wholesale emancipation of this kind was beyond the power of the Crown, or, though not invalid, censurable on constitutional grounds. If any such objection could be expected, nothing could be more aptly framed to meet it than the king's appeal to the Law of Nature as the paramount reason of public policy.

*The Reformation Controversies.*—In the sixteenth century the controversies incident to the Reformation gave a singular impulse to speculative political discussion. It would be difficult to name any modern theory of sovereignty of the State, or of the origin of society, which is not anticipated

<sup>1</sup> *Ordonnances des Rois de France de la troisième Race*, xii. 387. Maine, *Ancient Law*, 94, refers only to Louis Hutin's later ordinance.

<sup>2</sup> Maine, *l.c.*

somewhere in this mass of polemics;<sup>1</sup> and in particular the foundation of civil government was quite commonly referred to some kind of contract. The terms of the contract, and still more its implied conditions, varied according to the opinions of the disputant. But this did not materially affect the importance of natural law. For, since the original contract had in general no historical existence (however the ingenuity of dialectic might strive to disguise this), its terms could not be proved as a matter of fact. They could, therefore, only be presumed to be what they ought to have been; and what they ought to have been was eminently a question of natural law. More than this, it was a prevalent opinion that the original contract itself was of the nature of positive law, and subject to the Law of Nature, like all other branches of law. This or that particular State might be instituted by convention; but a State being once established, its rights and powers, it was said, were determined by principles of natural right paramount to all conventions.<sup>2</sup>

The various controversial exigencies of the Reformation and the Catholic counter-Reformation produced endless divisions and cross-divisions among Catholic and Protestant publicists, unexpected or even paradoxical in a modern reader's eyes. We find Dominican and Jesuit champions of the Papacy deliberately referring the foundation of the State to natural reason alone, in order to deprive the prince of any claim to spiritual jurisdiction. This, with the *Decretum* of Gratian still claiming respect, was a perilous line of argument. Again, the principles of the Law of Nature were invoked to moderate the letter-worship of the Reformers; the text of Scripture, the Catholics said, must be taken with, and subject to, the universal principles discoverable by reason, and construed in a manner consistent with them.<sup>3</sup>

<sup>1</sup> This is well noted by Professor Brissaud, of Toulouse, in his interesting study of the liberal movement in France (*Un Libéral au XVII<sup>e</sup> Siècle; Claude Joly, 1607-1700*; Paris, 1898), p. 5: "Si l'on se reporte par la pensée à la fin du seizième siècle, on est tout surpris de trouver, au lieu d'une seule foi politique, une véritable mêlée des esprits; théorie du contrat social, théorie de la souveraineté populaire, systèmes aristocratiques, ou même démocratiques, c'est une confusion extrême."

<sup>2</sup> Authorities and references in Gierke, *Johannes Althusius, passim*. As to the last-mentioned point, see at pp. 105, 106.

<sup>3</sup> So, in England, Pecoek (*Repressor*) as early as 1455.



Further, and this comes very near modern methods, it was sought to assure the sanctity of property and contract, including the supposed original contract itself, by representing those institutions as part of the immutable Law of Nature; this view was substantially adopted by Grotius, and has largely entered into modern economic doctrine. The process was made more plausible by identifying the *ius gentium* of the *Corpus Iuris* with the Law of Nature of the canonists. There were even those who dared assert that "Deus ipse ex promissione obligatur."<sup>1</sup>

*The Sovereign Power and Natural Law.*—One much agitated topic was the relation of sovereign power to natural and positive law. No doubt was entertained but that the Law of Nature was in some sense above all earthly potentates. This did not obviously decide the question whether a subject could in fact be justified in disobeying his lawful sovereign's commands as being contrary to the Law of Nature.<sup>2</sup> It was admitted that merely consequential or "secondary" rules of natural law, which might be binding in the absence of positive enactment, could be modified or restrained by positive law. St. Thomas was decisive on that point.<sup>3</sup> Subject to this distinction, however, it was the prevalent mediæval opinion that commands of the prince contrary to the Law of Nature were not binding on his subjects and might be lawfully resisted—a doctrine sometimes tempered by advising the subject to presume, in case of reasonable doubt, that the prince's judgment was right. A more dubious question was whether sovereign power was subject to positive as well as natural law. Did the imperial *potestas legibus soluta* belong of right to all independent sovereigns? In other words, were they the fountain of positive law and above it? There was good authority for saying so.<sup>4</sup> But it was also vigorously maintained that the ruler could be guilty of a breach of positive as well as

<sup>1</sup> Gierke, *op. cit.*, 270, 271.

<sup>2</sup> No subject, of course, could be bound by his allegiance to commit a breach of manifest elementary rules of faith or morals. Cases of that kind are outside the argument.

<sup>3</sup> *Sec. Secundæ*, qu. lvii., *De Iure*, arts. 2, 3,

<sup>4</sup> "Positiva lex est infra principantem sicut lex naturalis est supra." *Ægid. Rom. III. 2, c. 29.* This, with the caution that "principaus" is the king in Parliament, has long been the accepted English constitutional doctrine.

natural law, full sovereignty being reserved to the people, or in spiritual matters to the congregation of the faithful. Before the Reformation, Marsilio of Padua was the leading champion on this side.<sup>1</sup> This is the distinction of "organic" or "fundamental" from ordinary institutions. It is possible to argue, as Hobbes in effect did later, that such a distinction is incompatible with the Law of Nature. At this day it exists in a large majority of civilized commonwealths.

*Reversion to the Civil Law.*—As Protestant writers did not accept the authority of the Church, of the Canon Law, or of Aristotle, and the Roman disputants of the counter-Reformation were anxious to confute the Protestants on their own ground, the tendency of sixteenth-century controversy, as well as of Renaissance learning in general, was to bring the texts of classical Roman law into greater prominence. Thus a more definitely secular and legal cast was given to the whole treatment of the Law of Nature, and the way was prepared for the great construction of Grotius. Not that Grotius has anything disrespectful to say of the mediæval doctors. On the contrary, he ascribes the greatest weight to their agreement on questions of moral principle; when they are found unanimous on such questions, their opinion is more than probable: "ubi in re morum consentiunt, vix est ut errent."<sup>2</sup>

*The Law of Nature in England.*—Here we may leave the Law of Nature ready to achieve its development into the modern Law of Nations, and turn to its fortunes in our own country. The Canon Law, as we have seen, was the principal vehicle of the Law of Nature, and canonists were anything but popular among English laymen. In politics they were associated with attempts to encroach on the king's authority for the benefit of foreigners, in common life with the meddling and vexatious jurisdiction of the spiritual courts. Talking of the Law of Nature, therefore, was not a good way to most English ears, and it is not strange that we find little about it in English authors. William of Ockham, of whom we may justly be proud as our countryman, can still hardly be counted for this purpose. There is nothing particularly English about his career or his work;

<sup>1</sup> Gierke, *op. cit.*, 266.

<sup>2</sup> *De Iur. B. et P. Prolegg.*, s. 52.

he is cosmopolitan, like all the great mediæval doctors.

One English royal judge, Sir John Fortescue, did commit himself a century later to treating of the Law of Nature by name, but the case is in every way exceptional. His book, *De Natura Legis Naturæ*, was a plea for the Lancastrian title to the crown of England, addressed to Continental readers in the hope of obtaining Continental support. It is at best the artificial performance of a champion wielding unfamiliar arms in a strange field. Compared with the work of trained dialecticians, it is of slight interest and of no value.<sup>1</sup> What little is said of the Law of Nature in Fortescue's principal and really interesting book, *De Laudibus Legum Angliæ*—a book also intended, it would seem, for Continental readers—is ornamental, and of no greater importance.

We might expect to find the mark of the regular scholastic doctrine in the early history of the Court of Chancery, but there are only occasional references to law *and reason*—we shall see the importance of this term presently as the standard of decision. The current form, "for God and in the way of charity," is an appeal to the divine law of the Church rather than to natural law properly so called. Express invocation of the Law of Nature seems rather to have been purposely avoided. Probably it was felt that it would do more harm than good. The king's discretion was understood to be supreme in "matters of grace," and especially large wherever the profit of the Crown, or the rights of any one claiming by grant from the Crown, were affected. Any deduction of it from the Law of Nature would have looked like an attempt of canonical formalists to regulate the king's prerogative in some outlandish fashion of their own. After the Reformation it was a harmless exercise to identify the Chancellor's equity with the Law of Nature or with a Roman prætor's jurisdiction. I do not know of any example earlier than the seventeenth century.<sup>2</sup> Moreover, the administration of equity in anything like the modern sense was, in the fourteenth and

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<sup>1</sup> Mr. Plummer's account in his introduction to *The Governance of England*, at pp. 82-84, is enough for most purposes.

<sup>2</sup> See Malines, *Lex Mercatoria* (A. D. 1656), 311.

fifteenth centuries, by no means the sole or chief business of the Court of Chancery.

*The Law Merchant.*—For distinct English recognition of the Law of Nature we must look to such law and jurisdiction as had an avowed cosmopolitan character, and principally to the law merchant.<sup>1</sup> This was always understood to be founded on general reason and convenience, evidenced by the usage of merchants. "The law merchant, as it is a part of the Law of Nature and Nations, is universal and one and the same in all countries in the world."<sup>2</sup> In 1473, it was said by Stillington, Edward IV.'s Chancellor, in the great case of larceny by a carrier "breaking bulk," that the causes of merchant strangers "shall be determined according to the Law of Nature in the Chancery." Foreign merchants put themselves within the king's jurisdiction by coming into the realm, but the jurisdiction is exercisable "*secundum legem naturæ* que est appelle par ascuns ley marchant, que est ley universal par tout le monde."<sup>3</sup> It is said that the practice was to refer such causes to merchants by commission from the Chancellor.<sup>4</sup> In the ordinary jurisdiction of the king's courts we find a trace, but only a trace, of common lawyers envying the dialectic resources of the civilians and canonists. Yelverton said that he did not see why, in the absence of authority, the king's judges should not also "resort to the Law of Nature, which is the ground of all laws."<sup>5</sup> It is just possible that some design for enlarging the king's power through judicial discretion was at the bottom of this; it is all but certain that in the following century Henry VIII. had a plan to compass the same end by favouring the study of the Civil at the expense of the Common Law. Nothing came of it in either case, and the Tudors

<sup>1</sup> The law of the Admiralty stood too much apart to be specially considered here. There were mutterings of insular pride against its cosmopolitan jurisprudence as early as the fourteenth century. See the very curious gloss quoted in Maitland's *Bracton and Azo* (Seld. Soc., 1895), at p. 125.

<sup>2</sup> Sir John Davis, *Concerning Impositions*, c. 3, "dedicated to King James in the latter end of his reign," first printed 1656.

<sup>3</sup> Y.B. 13 Ed. IV., 9, pl. 5.

<sup>4</sup> Malines, *l.c.* In the thirteenth and fourteenth century suits between merchants could be pleaded in the king's ordinary courts according to law merchant. Y.B. 21 and 22 Ed. I., 75; 32 and 33 Ed. I., 377.

<sup>5</sup> Y.B. 8 Ed. IV., 12.

showed their wisdom by working out their practical despotism in other ways and under more national forms.

"*Law of Kind.*"—Theological and political tracts of the fifteenth century<sup>1</sup> just enable us to say that the proper English translation of *ius naturale* was "law of kind." "Doom of natural reason" is used as a synonym, and we have also the fuller expressions, "moral law of kind, which is law of God" (the regular equation of *ius naturale* with *ius divinum*), "law of kind, which is doom of reason and moral philosophy."

*Calvin's Case.*—We do find the Law of Nature making a considerable figure in the argument of two well-known cases of the late sixteenth and early seventeenth century—*Sharington v. Strotton* (the case of "Uses" in Plowden), and *Calvin's case* (the *post nati*), 7 Co. Rep., 12 b. Both of these were highly exceptional, of the first impression, and argued throughout on general principle. As already hinted, there was no longer any risk in using the Law of Nature to adorn an argument, and the new learning of such civilians as Alberico Gentili was making it fashionable again. No light is thrown by such peculiar examples on the usual habit of mind of English lawyers.

*The Law of Nature and the Common Law.*—But there is a real link between the mediæval doctrine of the Law of Nature and the principles of the Common Law. It is given by the use—correct in both systems, though constant, indeed exclusive, in the Common Law, and rather sparing in the Canon Law—of the words "reason" and "reasonable." This was pointed out in the first quarter of the sixteenth century by that very able writer, Christopher St. German, who must have been at least a fair canonist as well as an excellent common lawyer. In the preliminary part of *Doctor and Student*, after the Doctor has expounded the species of law according to the regular method of the schools, the Student gives the law of reason as the first of the general grounds of the law of England, and, in answer to the Doctor's inquiry where he puts the Law of Nature, explains that in the Common Law that term is not in use, but that where the canonist or civilian would speak of the Law of

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<sup>1</sup> Pecock, *Repressor; Dives and Pauper*, printed 1536.

Nature, the common lawyer speaks of reason. Once pointed out, the analogy is obviously just, and a real connection at least probable, for we are not to suppose that the judges and serjeants never knew any more of what the canonists were doing than is disclosed by the Year-Books. In our own time, before the Judicature Acts, it was the judicial etiquette of Common Law and Equity judges to assume, whether they had it or not, a more than modest ignorance of one another's doctrines. Yet this striking passage of St. German has been completely overlooked in modern times. It would be easy not to discover from current accounts of it that the *Doctor and Student* was anything more or other than a text book of Common Law. We can account for this only by the Reformation having broken up the scholastic tradition, and made it the fashion to despise the Middle Ages. Sir Henry Finch, writing early in the seventeenth century<sup>1</sup>—say in the third generation from St. German—had quite lost the thread; what he says of the Law of Nature is mere confusion. He actually makes out the law of reason (by which he seems to mean something approximating to the "secondary" natural law of the schoolmen) to be something different. Not a lawyer, but a divine, Hooker was the latest English writer who maintained the tradition substantially on its accepted lines, though not without variations and expansions which seem to be his own.<sup>2</sup> An English reader in search of a general exposition of the Law of Nature as understood down to the Renaissance might, indeed, do well enough to take Hooker for his guide.

*Hobbes, Etc.*—Hobbes retained the names of natural law and natural right, and (contrary to what is sometimes said by writers who have not studied him adequately) his language as to natural laws being immutable and eternal is as strong as anything to be found in orthodox publicists. But by defining *lex naturalis*<sup>3</sup> with reference to self-preservation as the only guiding principle, he broke away from previous authority to work out a method all his own. The practical

<sup>1</sup> *Discourse of Law*, first published 1613.

<sup>2</sup> *Eccl. Pol.*, bk. i, cc. 2, 3, 8, 9, 10, 12.

<sup>3</sup> *Leviathan*, c. 14.. Hobbes' *ius naturale* is not a rule at all, but every man's natural liberty to use his own power for his own advantage.

contents of Hobbes' morality are, nevertheless, not very different from other people's, nor was his political system without forerunners. But this does not concern us here. Richard Cumberland, Bishop of Peterborough, went about to refute Hobbes in the name of the Law of Nature (1672), but he made no attempt to return to mediæval lines. As to authority, he tries to get a fresh start from the Roman lawyers; as to principles and methods, he is (as Hallam justly observed) a precursor of the modern utilitarians. By his time the scholastic Law of Nature had finally ceased to count in English speculation. In France it fared no better, if we may judge by Montesquieu, who had lost the historical tradition as completely as any insular moralist. He supposed the Law of Nature to consist only of such rules of conduct as would be applicable in default of any settled government<sup>1</sup>—that is, in the fictitious "state of Nature," with which the original Law of Nature had nothing to do.

*The Modern Form of the Doctrine in England.*—But the Law of Nature was not dead; it was only transformed into a shape more available for making conquests in the modern world. Its doctrine, purged of clericalism, had been assimilated, through Grotius and his successors, by the modern Law of Nations, and had thus become part of the common stock of eighteenth-century publicists. In that form it was accepted without demur by rationalist philosophers who would have scorned to be knowingly beholden to the Middle Ages. From the Continent it came back to England, rather as an appanage of polite letters than as a constituent of technical jurisprudence. Blackstone made use of it at second or third hand to ornament—though merely to ornament—the introductory chapters of his *Commentaries*. Lord Mansfield took up the rationalizing movement as a practical reformer, and under his guidance it left permanent marks on more than one branch of English law. From the *Decretum* of Gratian to the equitable application of the "common counts," on grounds of "natural reason and the just construction of the law,"<sup>2</sup> and the full recognition of the law merchant in the king's courts, may seem a long way.

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<sup>1</sup>*Esprit des Lois*, l. 1, c. 2.

<sup>2</sup>Blackst., *Comm.*, iii. 161.

The journey was certainly roundabout ; but there is no real break in it.

There is much to be said of the function of natural or universal justice, including the idea of reasonableness in its various branches, in the later developments of our system. In particular an important part has been played by natural law, under the name of "justice, equity, and good conscience," or otherwise, in the extension of English legal principles under British political supremacy, but beyond English or Common Law jurisdiction. But this topic is large enough to deserve separate consideration.

FREDERICK POLLOCK.



ANOTHER PHILIPPINE CONSTITUTIONAL  
QUESTION—DELEGATION OF LEGISLA-  
TIVE POWER TO THE PRESIDENT.

THE Philippine Islands became the property of the United States on April 11, 1899, but Congress has as yet passed no laws for their government, or for the protection or regulation of the personal or property rights of their inhabitants.<sup>1</sup> They have been governed by the President in monarchical form. He has not only executed the existing laws of the islands, but has legislated also; and without authority from Congress he has sent there a legislative body consisting of five Commissioners, who discuss and pass bills, and report to him through the Secretary of War.

Whatever validity his legislative acts may have is derived from the fact of an insurrection throughout the greater portion of the islands, which was already in existence on April 11, 1899, and which is still pending. Before that date, when the islands belonged to Spain, he had the full power of a military conqueror; and a military conqueror in foreign territory, even under our form of government, is not obliged to respect the theoretical division of responsibility between legislative, executive and judicial powers. The President, as Commander-in-Chief, may even go to the extent of providing a complete new code of laws, regulating the personal and property relations of his temporary subjects, as well as their governmental system.<sup>2</sup> Whether he has had the right to go to this full extent since the territory has been transferred to us by treaty, and has become domestic, is a matter of doubt; but even in domestic territory, during the pendency of an armed insurrection there, he may exercise many of the powers of a military conqueror, legislating at least so far as to set up a temporary

<sup>1</sup> The only legislation other than for our army and navy is a very small appropriation for postal service (31 Stat., 252).

<sup>2</sup> *Leitensdorfer vs. Webb*, 20 How., 176, 178; *Cross vs. Harrison*, 16 How., 164, 190.

government of martial law, ignoring many constitutional rights, and maintaining a court system and taxation system of his own contrivance.<sup>1</sup>

We have received information, however, that all resistance to our forces in the islands would cease on November 7, 1900. While the exact date seems not to have been observed, we nevertheless hope for a speedy return of peace, when martial law and military despotism shall end; yet Congress has so far made no provision for the subsequent government of the islands.

Such a provision was proposed at the last session of Congress by Senator Spooner of Wisconsin. His proposition was understood to have the approval of the administration, and is commonly known as the Spooner Bill. It was introduced by him on January 11, 1900, was reported with approval by the Committee on the Philippine Islands, and became the regular order of business in the Senate on April 4. It remained the regular order thereafter, but was laid aside on special motion almost every day, and, while a few speeches were made about it, the session ended on June 7 without any action. On December 4, the first working day of the next and now pending session, it was displaced to make way for a subsidy bill, and is no longer the "unfinished business"; but it is still the only scheme of government for the Philippines which has had any serious backing in Congress.

The law proposed by Senator Spooner was to go into effect when the insurrection "shall have been completely suppressed." It was to remain in operation "until otherwise provided by Congress," in other words, for as long as any other statute. It delegated to the President and his appointees the entire legislative and judicial power, so far as "necessary to govern" the islands. The islands were not to be governed through a scheme of legislation devised by Congress, as is the case with New Mexico, Arizona, Oklahoma, Alaska, Hawaii and Porto Rico, but they were to be governed like a British Crown Colony—in other words, like a conquered country in military occupation.

The question will at once occur whether this monarch-

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<sup>1</sup> *Texas vs. White*, 7 Wall., 700, 730; *The Grapeshot*, 9 Wall., 129; *Mechanics' Bank vs. Union Bank*, 22 Wall., 276.

ical form of government is to be altogether unhampered by constitutional restrictions—whether the Filipinos are to be unprotected by the Bill of Rights, by the provision for uniformity of taxation, and by the other guaranties of the Constitution. This I do not intend here to discuss.<sup>1</sup> If these constitutional guaranties operate in the Philippine Islands, and are available to the Filipinos, Congress is subject to them in all its legislation. It cannot delegate to the President any greater or more unrestricted legislative powers than it possesses itself. The President therefore would be equally bound.

The question which I propose to discuss in this article is whether Congress has authority to delegate its legislative powers to the President, and cast upon him its legislative responsibilities; a question which has been under discussion for a century past, although never before our late war, except perhaps in one very temporary emergency, has it been even seriously proposed to confer upon him such a sweeping jurisdiction.

I do not, however, intend to argue that it would be inadvisable, if constitutional. On the contrary, I think that the arguments in favor even of the most complete delegation of legislative power are so weighty that they should receive respectful consideration. They may be stated under three heads.

First, the precedents are in its favor. We have no colonial precedents of our own that are of any great value, because we have never before annexed a settled and populous country of alien tongue and traditions. A most effective argument in favor of our ability to govern such a country with mutual satisfaction and the approval of the

<sup>1</sup> The legislative, executive and judicial precedents are collected by the writer, and the ablest discussions referred to, in an article on "The Porto Rico Tariffs of 1899 and 1900," *Yale Law Journal*, May, 1900. Since then there has been a decision by Judge Townsend of Connecticut (*Goetze vs. United States*, 103 Fed. Rep., 72), now, with certain unreported decisions, before the Supreme Court for review. There have been a number of decisions by the Supreme Court of Hawaii upon these points (*Peacock vs. Republic of Hawaii*, 12 Hawaii, 27; *Republic vs. Edwards*, *Id.*, 55; *Honomu Sugar Co. vs. Sayewiz*, *Id.*, 96; *ex parte Edwards*, decided Oct. 9, 1900; *Territory of Hawaii vs. Marshall*, decided the same day). The whole subject is discussed by C. F. Randolph in his work on "The Law and Policy of Annexation," now in press. Some analogous questions arising out of our anomalous occupation of Cuba are now under advisement by the Supreme Court in the case of *Neely vs. Henkel*.

civilized world has been the success of Great Britain in doing this same thing. It is therefore in order to examine the method which Great Britain uses under similar circumstances;<sup>1</sup> and if we find that method to be one permitted by our Constitution, the burden of proof may be considered as upon those who urge that it be disregarded, and that some novel and untried system be substituted. Parliament recognizes that home affairs deserve its first attention, and are varied enough to occupy its time, and it does not attempt to provide the necessary legislation for the British colonies or dependencies. For those which have attained such a position that they are entitled to govern themselves, Parliament provides an enabling act which is practically a constitution, and thereafter interferes no longer. Until a colony has reached the stage of self-government—so long as it is in the position of the Philippines—its legislation is not enacted by Parliament, but by the Crown in Council. A new colony acquired by conquest or cession comes as a matter of course under the jurisdiction of the Crown in Council, although the Crown cannot make laws "contrary to the fundamental principles" of English law, or, as we should say, its legislation must be constitutional.

Second, it is a matter of doubt whether our legislative machinery is such as to yield the best results in the present situation. The problems presented are very delicate, very difficult and very complex. The amount of legislation which will be required by these numerous islands with their varied population and civilization is probably great. It should be drafted by persons who have familiarized themselves with all of the conditions on the spot—persons familiar with the language, history, customs, traditions, prejudices and manners of both Spaniard and Malay. Even were these conditions fulfilled, missteps must be expected—missteps which it will be to the interest of all parties quickly to retrace. Congress is not in session all the time, and it can pay but a small fraction of its attention to trans-oceanic difficulties. But few persons can be possessed of the fund of information necessary as a basis for proper legislation, and those persons cannot easily be brought into contact

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<sup>1</sup> See Anson's Law of the Constitution, 2d ed., vol. ii., p. 264, *et seq.*

with the working committees at Washington. However important it may be to push through rapidly some piece of legislation, it will be antagonized with every kind of domestic question, as well as with the affairs of Porto Rico, Hawaii and Nicaragua, not to speak of the oppressed of other countries who may receive legislative sympathy. Deadlocks must thus be expected, even in the present unusual situation, when the President has a working majority of supporters in both branches of Congress. It is quite possible that this situation will terminate on March 3d, 1903, and that we may enter another period of normal legislative deadlock, like that which lasted with slight interruption from 1875 to 1897. If the Spooner bill be passed, it will be within the power of the present and each succeeding President to keep a commission of trained experts at Manila, who may continue to legislate for the benefit of the Philippine Islands until the inhabitants of those islands are themselves prepared to take up the work, and then depute to a native or partly native assembly such portions of the legislative power as may be best, subject, of course, to the power of Congress to step in and establish a permanent territorial government in the islands.

Third, if Congress, deeming it inadvisable at present to grant legislative autonomy to the islands, attempts to do what Parliament has never attempted to do, namely, provide the necessary legislation itself, then we must be the sufferers, for the proper discharge of the duties thus assumed will take up months of every congressional session, and measures in which we are more immediately interested must stand aside, just as at the last session of Congress the Spooner bill, although it came to nothing, crowded out the Nicaragua Canal bill and other measures of public interest. There is certainly considerable force in the contention that it would be better for us, as well as for the Filipinos, if President McKinley until 1905, and his successor thereafter, whoever and of whatever party he may be, can have the sole power and sole responsibility of legislating for these islands.

But can this power and this responsibility be placed upon them?

Our government is divided into three branches, execu-

tive, legislative and judicial. Its theory is that each branch shall perform its own functions, and not delegate them to the other. The maxim that the Legislature cannot delegate the power to make laws is as old as Locke.<sup>1</sup> Judge Cooley who has treated it more fully than any other text writer of authority, says: "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."<sup>2</sup>

The United States Supreme Court has recognized the maxim from an early date, and it received the endorsement of all the judges in *Field vs. Clark*, the leading case on this subject.<sup>3</sup> Justice Harlan said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."<sup>4</sup> Justice Lamar said: "That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument."<sup>5</sup>

An exception may be claimed to exist here, because

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<sup>1</sup> "The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." (Locke on Civil Government, Sec. 142.)

<sup>2</sup> Cooley's Constitutional Limitations, 6th ed., p. 137.

<sup>3</sup> 143 U. S., 649.

<sup>4</sup> *Id.*, p. 692.

<sup>5</sup> *Id.*, p. 697.

Congress can concededly delegate to the President, to Cabinet officers or to the courts the power to make mere "rules and regulations," according to our current phraseology; while the right to legislate for the Territories is commonly attributed to the constitutional provision granting power to Congress to "make all needful *rules and regulations* respecting the territory or other property belonging to the United States."<sup>1</sup> There has always been doubt, however, whether this provision has any application to territory acquired since 1789.<sup>2</sup> And the words "rules and regulations" have always been treated in the practical construction of the Constitution as the equivalent of "statutes." Provisions for the Territories have commonly been inserted in statutes mainly intended for the States. Moreover, this special power is expressly confided to Congress as fully as is the general power of legislation, so that if one power can be delegated to the President, it would seem that the other can be delegated to him also.

But while the United States Supreme Court has at various occasions recognized the general principle that legislative power cannot be delegated,<sup>3</sup> it has never yet found it to be applicable to any case that actually came before it for decision; and while the principle as a general principle has been generally recognized in the State courts, the actual number of statutes which have been by them declared unconstitutional is but small, and even of these decisions a majority have either been overruled, or generally disapproved, upon the point decided. In fact, the two cases which Judge Cooley in his shorter work refers to as the leading applications of this constitutional principle,<sup>4</sup> have

<sup>1</sup> Constitution, Art. IV, Section 3.

<sup>2</sup> *American Insurance Co. vs. Canter*, 1 Pet., at pp. 542-3, 546; *United States vs. Gratiot*, 14 Pet., at p. 537; *National Bank vs. Yankton*, 101 U. S., at p. 132. The fullest judicial treatment is in *Dred Scott vs. Sandford*, 19 How., at pp. 432-447, 500-515, 604-615.

<sup>3</sup> *Wayman vs. Southard*, 10 Wheat., 1, 42, per Marshall, C. J.; *Bank of United States vs. Halstead*, *Id.* 51, 61; *In re Rahrer*, 140 U. S., 545, 560; *Field vs. Clark*, *supra*.

<sup>4</sup> Cooley on the Constitution, 3d ed., p. 111, citing *Barto vs. Himrod*, 8 N. Y., 483 (declaring a *referendum* to the people of the entire State invalid), and *Rice vs. Foster*, 4 Harringt., 479 (prohibiting local option laws, and similar instances of a *referendum* to the people of a county or municipality). The other case cited is a mere *dictum*, the application of the principle being denied.

both met with a great amount of disapproval by subsequent courts and writers, including Judge Cooley himself.<sup>1</sup> The decisions which were the original supports of the doctrine have thus been knocked from under it. New applications of the principle are still occasionally made by the State courts, however.<sup>2</sup>

In one of the earlier cases upon the power to delegate legislative authority, Chief Justice Marshall said that "the precise boundary of this power is a subject of delicate and difficult inquiry,"<sup>3</sup> and subsequent adjudications, while proving the delicacy and difficulty of the inquiry, and extending to some extent what was at that time supposed to be the probable boundary of the power, have failed to locate the boundary even approximately. The question has several times since *Field vs. Clark* been elaborately argued before the Supreme Court of the United States in cases of importance, but the court has each time found some other point upon which the decision might turn.<sup>4</sup>

Statutes like that considered in *Field vs. Clark*, and statutes submitted to the *referendum*, are enacted by the legislature in complete form, and await only the executive decision or the popular vote to go into operation. But statutes which delegate full legislative power—power to draft the law as well as to give it operation—are also familiar.

<sup>1</sup> See Cooley's Constitutional Limitations, 6th ed., notes to pp. 142-4, approving passages quoted from *State vs. Parker*, 26 Vt., 357, and *Smith vs. Janesville*, 26 Wis., 291. The *Barto* case has some support outside of New York, but there is now an immense weight of authority against the *Rice* case.

<sup>2</sup> *Adams v. Burdge*, 95 Wis., 390; *Dowling vs. Insurance Co.*, 92 Wis., 63; *O'Neill vs. Insurance Co.*, 166 Pa. St., 71; *Sanders vs. Southern Electric Ry. Co.*, 147 Mo., 411, 426-7.

<sup>3</sup> *Wayman v. Southard*, 10 Wheat., 1, 46: "There is perhaps no class of questions ever presented for judicial consideration which involve more real difficulty, or leave greater room for the mind to remain in doubt" (*In re Oliver*, 17 Wis., 681). "The great difficulty exists in the attempt to fix on the precise boundary line between legislative and executive powers in their practical operation. This is not possible. You might attempt the search for the philosopher's stone, or the discovery of the perpetual motion, with as much prospect of success" (Mr. Giles, of Virginia, in the Senate, *Annals of Congress*, Dec. 21, 1808, p. 259).

<sup>4</sup> *United States v. Rider*, 163 U. S., 132; *Lake Shore Railway v. Ohio*, 165 U. S., 365, 368; *Cruickshank v. Bidwell*, 176 U. S., 73; *Rider v. United States*, 178 U. S., 251, 258-9; see also *United States v. Keokuk Bridge Co.*, 45 Fed. Rep., 178; *United States vs. Rider*, 50 Fed. Rep., 406; *United States v. City of Moline*, 82 Fed. Rep., 592.



Thus, the legislature, after indicating the general features of a proposed system of legislation, may delegate the right to work out the details, as by authorizing an executive department to adopt regulations,<sup>1</sup> or by authorizing the judiciary to adopt rules of practice.<sup>2</sup> It may delegate to the officers of a territorial subdivision or municipality very wide powers of legislation for purely local purposes.<sup>3</sup> Nor is Congress confined to the Executive and Judiciary in delegating the power to fix the details of legislation. It may permit such subjects as ascertaining the proper qualifications for transacting business requiring professional skill to be referred to official associations of persons learned in the law, in medicine, or in other skilled vocations.<sup>4</sup>

Broad powers are delegated to Territorial Legislatures, but this is the case also with legislatures of municipalities. It is not essential that a territory, or that a city, should have an elective legislature;<sup>5</sup> but it would be a novelty to delegate the whole legislative power either to a President or to a governor, to be exercised at his discretion through such forms as he might select. In granting all legislative, as well as executive and judicial, authority over the Philippines to the President, as the Spooner bill seems meant to do, it is without precedent. Its introducer said indeed: "It is fashioned after the Louisiana bill. It is fashioned after the Hawaiian resolution."<sup>6</sup> The present bill is to a considerable extent fashioned after the bill of a century ago; but with differences that are radical, as

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<sup>1</sup> *In re Griner*, 16 Wis., 423, and precedents cited; *United States vs. Bailey*, 9 Pet., 238; *Caha vs. United States*, 152 U. S., 211, 219; *United States v. Ormsbee*, 74 Fed. Rep., 207.

<sup>2</sup> *Wayman v. Southard*, 10 Wheat., 1.

<sup>3</sup> *Paul vs. Gloucester County*, 50 N. J. Law, 585, 600; 1 Dillon on Municipal Corporations, Sec. 308.

<sup>4</sup> *Scholle vs. State*, 100 Md., 729, and cases cited; *Hewitt vs. Charier*, 16 Pick., 353; see *Dent vs. West Virginia*, 129 U. S., 114, 122; *State vs. Heinemann*, 80 Wis., 253, 257-8. Standards of importable drugs have for fifty years past been fixed in part by foreign pharmacopœias (U. S. Rev. St., Sec. 2935).

<sup>5</sup> See 1 Stat., 51, n. 123, 550; 2 *Id.*, 284.

<sup>6</sup> Congressional Record, May 24, 1900, p. 6690.

may be seen by placing them in parallel columns.<sup>1</sup> There are two differences. The Louisiana act, originally drawn so as to operate like other laws for the indefinite future,<sup>2</sup> was amended on motion of the then leader of the House of Representatives, John Randolph, of Roanoke, so as to have but a temporary effect; and in the language of the mover it "compelled Congress to take early measures for reducing this enormous power delegated to the Executive."<sup>3</sup> Mr. Randolph said: "If we give this power out of our hands, it may be irrevocable until Congress shall have made legislative provision; that is, a single branch of the Government, the Executive branch, with a small minority of either House, may prevent its resumption. He did not believe that under any circumstances it was proper to delegate to the Executive a power so extensive."<sup>4</sup> This emergency measure, so closely restricted in point of time, also, delegated little, if any, genuine legislative power to the President. It did not, as now proposed, delegate to him all the powers "necessary to govern" the new territory, but only those powers actually "exercised by the officers of the existing government of the same." The President could grant no new power, although he had some vague authority to regulate the "manner" of exercising the powers already existing. In other words, the Louisiana act was analogous to the now familiar type of legislation which grants power in outline, the outline to be filled in by departmental regulations or

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<sup>1</sup> Louisiana Act.

*Until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion (2 Stat., 245).*

<sup>2</sup> Annals of Congress, October, 1803, pp. 18, 498.

<sup>3</sup> *Id.*, p. 498.

<sup>4</sup> *Id.*

Spooner Bill.

[After the termination of the insurrection] all military, civil and judicial powers *necessary to govern the said islands* shall, *until otherwise provided by Congress*, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property and religion.

court rules. This emergency measure was debated but a single day.<sup>1</sup> Although its operation was subsequently extended for a short time,<sup>2</sup> it remained in operation but eleven months, and was never brought to the attention of the courts; and the constitutional objections ably urged by the opposition leader, Roger Griswold, of Connecticut, were defeated largely, doubtless, upon the reasoning above stated.

The Hawaiian annexation resolution<sup>3</sup> went a step further than the Louisiana bill, for it was given an indefinite operation; but it still fell radically short of the Spooner bill, for it, like the Louisiana resolution gave to the President, but a restricted legislative power, if any.<sup>4</sup> I do not think that the Hawaiian resolution is entitled to serious consideration as a precedent. It was pressed through under the excitement of the early period of the Spanish War. It involved new and momentous problems, as for the first time we were annexing a settled and populous land beyond the seas. The constitutional arguments in Congress turned upon the question whether foreign territory could be annexed by act of Congress otherwise than as a State<sup>5</sup>, and little, if any, notice was taken in the debate of the question now before us. Moreover, the Hawaiian resolution is too recent to have weight as a practical exposition of the Constitution.

For these reasons I think that the courts, if the constitutionality of Mr. Spooner's measure shall ever come before them for consideration, will not rest their decision upon leg-

<sup>1</sup> Annals, October 27, 1803, pp. 498-514.

<sup>2</sup> Act of Mar. 26, 1804, Chap. 38, Sec. 16.

<sup>3</sup> Joint resolution of July 7, 1898, 30 Stat., 750.

<sup>4</sup> "Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct."

<sup>5</sup> Early annexations had been justified by the Courts under the war and treaty making powers. Texas was annexed as a State under the power to admit new States. Power to annex a mere territory by a legislative act had been denied by Senator Thurman and others in the San Domingo debate of 1870, and the question was ably debated on both sides in 1898. The precedent relied upon by the supporters of the resolution was the Guano Islands Act of 1856 (*Jones vs. United States*, 137 U. S., 202, 209, 212). The Hawaiian Supreme Court has since recognized the difficulty of this question in *Peacock vs. Republic of Hawaii* (*supra*).

islative precedents. The question will be an original one, and will be treated as such.

The Guano Islands Act of 1856 delegated to the discretion of the President, unhampered by any rules or limitations, the question whether newly discovered Guano Islands should "be considered as appertaining to the United States." The Supreme Court in sustaining the statute called this "a strictly executive power."<sup>1</sup> It certainly involved a very wide discretion, and upon a most important matter, if the view be correct which treats his affirmative action as annexing the islands to this country.<sup>2</sup>

The above-quoted case of *Field v. Clark*,<sup>3</sup> arising under the McKinley Tariff Act of 1890, is the one in which the Supreme Court has come nearest to marking the boundary within which legislative power may be delegated. While denying the right to delegate, the majority of the Court state in their opinion that the Legislature may provide that a statute shall not take effect until "upon a named contingency," when "the proper occasion exists," upon the occurrence of "some fact or state of things upon which the law makes, or intends to make, its own action depend." They say that the question of fact as to whether the time has arrived may be left to the decision of an executive officer.<sup>4</sup> This seems on a first reading a simple and practicable distinction. If, however, we examine the question thus left to the President's uncontrolled discretion, we find that it was something very different from the ordinary "question of fact" so familiar to a lawyer. It was whether "the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the *agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States* he may deem to be *reciprocally* unequal and unreasonable." If he deemed them so, the President was to collect certain specified duties upon imports from that country,

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<sup>1</sup> *Jones vs. United States*, 137 U. S., 202, 209, 215.

<sup>2</sup> Hawaiian debate (*supra*).

<sup>3</sup> 143 U. S., 649.

<sup>4</sup> *Id.*, at pp. 692-4.

The Court in its opinion also intimate approval of the act of 1794, authorizing the President to lay an embargo on all ships and vessels in the ports of the United States "whenever, in his opinion, the public safety shall so require;"<sup>1</sup> and of the act of 1799, authorizing the President to resume commercial intercourse with France "if he shall deem it expedient and consistent with the interest of the United States," and to break off intercourse again "whenever, in his opinion, the interest of the United States shall require."<sup>2</sup> According to the doctrine of the Field case, therefore, the execution of a law may be made to depend upon the question whether the President deems it advisable that the law should go into operation.

The Court has recently gone a step farther in the case of *Dunlap v. United States*.<sup>3</sup> That case arose under a law granting a rebate of the tax upon alcohol "under regulations to be prescribed by the Secretary of the Treasury."<sup>4</sup> The Secretary refused to provide regulations, and the Court construed the law as having "left it to the Secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required," saying that "it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations, *if* he found it practicable to do so." The constitutional question was brought to the attention of the Court in this case, which was argued for the claimant by eminent counsel.

It seems to me that in both of these cases there was what the Courts have often called a delegation of legislative discretion. There was no standard provided by which the President should judge whether foreign legislation was "reciprocally" unequal and unreasonable, in

<sup>1</sup> *Id.*, p. 691.

<sup>2</sup> The Court treats these early laws as a contemporaneous and practical construction of the Constitution; but the constitutional question was raised and debated in Congress a few years later with elaborate examination of the precedents (*Annals of Congress*, 1807-8, pp. 2198-2241; *Id.*, 1808-9, pp. 245-298, 315), and the language of similar laws was thereafter somewhat modified, perhaps, to meet these objections. "The Reciprocity Acts of 1890. Are they Constitutional?" *American Law Register and Review*, March, 1892.

<sup>3</sup> 173 U. S., 65.

<sup>4</sup> Tariff Act of August 28, 1894, Sec. 61.

view of the concessions made by us to foreign Governments. It is difficult to see why Congress should not as well provide that the President might remove the articles named into the dutiable list, if he should at any time deem the revenue in need of replenishment, or our industries in need of encouragement. There was no standard provided by which the Secretary of the Treasury should judge whether it was practicable to grant a rebate on alcohol without further legislation. It is difficult to see why Congress should not as well provide that he might discontinue certain tariff or internal revenue duties if they did not pay the cost of collection, or if they caused retaliation by foreign States, or resulted in the control of industries by large combinations of capital.

Both of these so-called questions of fact, and still more those involved in the acts of 1794 and 1799 to which I have alluded, were questions involving the use of that kind of discretion which ordinarily is the basis of legislative action; but in all of these cases, the Legislature thought that the discretion could be more wisely exercised by an executive officer than by itself. And if the Legislature is of that opinion, why should it not have the power to delegate its discretion?

If a given scheme of legislation may be adopted merely in outline, to be filled in by the Executive, and if its operation may be suspended until the Executive shall consider it practicable or fair to foreign nations, or for the best interest of the United States, for the law to have effect, does it follow that a given subject of legislation may be delegated to the Executive altogether, to provide the scheme as well as the details? It is difficult to say why the line should be drawn just short of this, after the previous extensions.<sup>1</sup>

It seems to me that the courts, while repeating indeed the old maxim that legislative power cannot be delegated,

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<sup>1</sup> In *Martin vs. Witherspoon*, 125 Mass., 175, the court sustained a delegation to the Executive of the subject of pilotage regulations. The power to remit penalties, originally regarded as legislative (6 U. S. Stat., 3), was delegated to the Secretary of the Treasury at an early date (*The Laura*, 114 U. S., 411, and stat. cit.). To the Executive has been delegated the subject of game laws, and importation of fire arms, in Alaska (U. S. Rev. St., Sections 1955, 1956). Wide powers are delegated to the President by the national health legislation (Rev. St., Section 2494; Food Act of August 30, 1890, Sections 4, 5).

have very nearly overthrown it, and have done so because it was not based on sound reasoning, and has always been impracticable in application. The maxim is, in fact, a restriction upon legislative power. If Congress believes that the practical limitations upon its own time and upon its own means of information are such that all legislation upon one subject or upon all subjects in the Philippine Islands could be better provided by the President through resident commissioners or otherwise than by itself, why should Congress not have the power to make such an arrangement? If it has not the power to delegate a part of its functions when such a delegation is in accordance with public interest, and in accordance with its own wishes, then it seems to me that there is a most serious defect in its authority.<sup>1</sup>

It may be conceded that the Legislature cannot delegate distinctly legislative functions to the Executive, any more than to the Judiciary, without the consent of the latter. No department can be made to do the duties of another department, except by its own consent. It may be conceded also that a statute is conceivable—although perhaps none has ever been actually enacted—which would be incontestably void as a delegation of legislative power. Thus, if we assume that at the end of the second year of a presidential term one of the political parties is in possession of the three branches of the Legislature (President, Senate and House), and that the Senate and House are about to pass into the control of the opposite party by less than a two-thirds' majority, it is conceivable that a law might be enacted delegating the entire legislative power to the President for the remainder of his term, in order that the outgoing party might retain its grip on the Government; and such a statute may be conceded to be unconstitutional.

But if I have correctly construed the Field and Dunlap cases, then every statute is constitutional which evinces upon its face a legislative belief that some executive or judicial officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular

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<sup>1</sup> A similar argument is made by Frear, J., in support of the doctrine that territory may be annexed by a statute or treaty which provides for a transition period before the Constitution and laws of the United States shall have full application, in *Peacock vs. Republic of Hawaii*, *supra*.

result which Congress desires, and such a statute will operate, at least unless the officer upon whom the burden is cast declines to bear it; and perhaps it is not improbable that this principle may be held broad enough even to cover an entire subject such as the internal government of the Philippines—especially if legislation on the lines of the Spooner bill may have the good fortune to come into court strengthened by a mass of rights vested under it, by the *prestige* of a successful colonial establishment, and by the force of public opinion.

If, however, the present Congress fail to pass even such a bill, and if before the assembling of its successor the Philippines may be fortunate enough to see the termination of the war, then there will be no legitimate method of affording any legislation for their needs, however pressing. When the President shall proclaim that peace has come, his present legislative powers will thereupon absolutely cease. Except in the abnormal condition of war, and by virtue of his authority as Commander-in-Chief, the Executive has no legislative power under our Constitution.<sup>1</sup> That power is confided to Congress. Until Congress shall act, the then existing Government and laws of the Philippine Islands, no matter how defective or harmful they may turn out to be, must remain *in statu quo*,<sup>2</sup> except, indeed, so far as they are inconsistent with our constitutional guaranties, and therefore void.<sup>3</sup> Whatever legislative powers, if any, may have inhered in the Spanish crown, are not inherited by the President. "Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government, and not according to those of the Government ceding it."<sup>4</sup> His powers will be confined to the execution of the hold-over laws, whatever at

<sup>1</sup> I refer of course to domestic territory, not undertaking to discuss his legal position in Cuba, where he is the *de facto* ruler of what is in our courts (whatever it may be in international law) a foreign country.

<sup>2</sup> *Cross vs. Harrison*, 16 How., 164, 195, 198-9; *Leitensdorfer vs. Webb*, 20 How., 176, 178. The President's power was "so long as the war continued" (*Texas vs. White*, 7 Wall., 700, 730). This seems to be admitted by the present Attorney-General (22 Atty. Gen. Op., at p. 549, July 27, 1899).

<sup>3</sup> See *Chicago, &c., Ry. Co. vs. McGlinn*, 114 U. S., 542, 546; *Cross vs. Harrison*, 16 How., at p. 185, quoting Secretary Buchanan.

<sup>4</sup> *Pollard's Lessee vs. Hagan*, 3 How., 212, 225.



that moment they may happen to be. He may indeed, if and so far as a present condition of belligerency may now enlarge his constitutional powers, prevent a judicial decision of his incapacity by delaying his proclamation of peace, pretending that there is war when there is no war ; for the judiciary treat his proclamation as conclusive upon such a point, and take no evidence to prove the contrary.<sup>1</sup> But this would be a subterfuge unworthy the head of a great nation, and not, therefore, one which we have a right to expect. If the legislative branch of our Government shall adjourn for nine months on March 4, next without providing for the future rule of the great archipelago which will then have been for nearly two years under our protection, it will have given a strong argument to those who claim that our institutions are unsuited to the responsibilities of a world-encircling empire.

EDWARD B. WHITNEY.

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<sup>1</sup> *More vs. Steinback*, 127 U. S., 70, 80; compare *United States vs. Anderson*, 9 Wall., 56, 70; *The Protector*, 12 Wall., 700; *The Three Friends*, 166 U. S., 1, 63.

# COLUMBIA LAW REVIEW.

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IN the publication of the COLUMBIA LAW REVIEW we feel that we have undertaken a task which may prove to be beyond our powers. Yet we have been encouraged to proceed in the hope that if our efforts are successful, the magazine will be of service to the profession. And in this, our initial number, we wish to indicate the general purpose of our undertaking. The plan was conceived with the idea that there is a field for still another magazine devoted to the discussion of legal problems, and containing besides, a summary of current decisions and discriminating reviews of law books. The only undergraduate work will appear in the digests and criticisms of recent cases. For our other material we shall look entirely to members of the Bar, encouraged by the cordial aid already given.

For the generous support which we have received from the Bench, the University and the Bar we wish to express our gratitude and to it attribute any measure of success which may come to us. In particular, we wish to thank the editors, past and present, of the *Harvard Law Review*, not only for setting before us a standard to which we some day hope to attain, but also for their kindly suggestions.

# NOTES.

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CONSTITUTIONAL LAW—NATURALIZATION OF PORTO RICANS—SUFFRAGE.—*The People of the State of New York ex rel. Frank Juarbe v. The Board of Inspectors, etc.* 32 Miscellaneous, 584.

This was an application for a mandamus to compel the Board of Inspectors of an election district to register the relator, a native of Porto Rico, as a qualified voter. The board had refused to register him on the ground that although his residence in the district was sufficient, he was not a citizen of the United States. *Held*: under the XIVth Amendment to the Constitution defining citizens as "all persons born or naturalized in the United States and subject to the jurisdiction thereof," this refusal was proper since the relator, who was not a native-born citizen of the United States, had not been naturalized, either by the usual process, or by the Treaty of Peace with Spain, Congress having so far failed to execute the clause, Article IX, which provides that that body shall "determine" the "civil rights and political status of the native inhabitants of the territories hereby ceded."

The above decision, it seems, has been considered by some to hold that Porto Ricans, as they are not citizens, are altogether outside the Constitution and laws of the United States. Such was not the understanding of the Court. On the contrary, the learned judge said (p. 589): "The right claimed by the relator depends upon express proof that the rights of full citizenship were conferred and it cannot be upheld solely upon the broad claim that the Constitution follows the flag, or the claim that in the United States there can be no subjects. If it were a case in which the relator was sought to be deprived of life, liberty or property without due process of law, a different question would be presented."

In the use of the phrase "full citizenship," there appears to be an implication that the word citizenship may be used in different senses, and that a person may be a citizen for some purposes without being a citizen for all purposes. It must be confessed that there is some foundation for such an implication, owing to the fact that the terms "citizen" and "citizenship" are often used vaguely and indefinitely to denote not merely a legal relation under municipal law, but also the more general idea of nationality. The Treaty of Peace with Spain in the article from which we have quoted, recognizes this distinction, when it couples with the provision that "the civil rights and political status of the native inhabitants shall be determined by Congress," the stipulation that natives of Spain,

residing in the ceded territory, shall, unless they declare their intention to preserve their "allegiance" to Spain, be held to have adopted the "nationality" of the territory in which they reside.

These clauses make a clear distinction between citizenship under municipal law and citizenship in the sense of nationality. Nor is the distinction novel, though it may have been somewhat neglected or overlooked by writers. It was clearly indicated by Mr. Marcy, as Secretary of State, in the Koszta Case (*Wharton's Int. Law, Digest II, § 198*). In that case there was no pretense that Koszta was a citizen of the United States, but it was maintained that as he had been decitizenized and banished by Austria there might be claimed for him, in virtue of his domicile in the United States, an American nationality. In the whole discussion Mr. Marcy carefully speaks of the "national character" and not of the "citizenship" of Koszta as the foundation of his position.

As to what bearing, if any, the possession of American nationality as distinct from American citizenship, might have upon the assertion of rights to life, liberty and property under the Constitution of the United States we do not in this place undertake to say. We wish merely to point out the fact that the learned Judge who decided the case under discussion reserved that question.

**TRUSTS—NEW YORK RULE AGAINST PERPETUITIES.**—In 1893 the New York Legislature amended the State Law of Uses and Trusts by a section allowing a beneficiary of a life interest who was also the absolute legal owner in remainder, to execute to his trustee a release which would thereby revest the entire legal estate in the beneficiary. The above provisions of the Law of 1893 were embodied in Section 83 of the Real Property Law (Chap. 547, Laws of 1896), and in Section 3 of the Personal Property Law (Chap. 417, Laws of 1897). These sections make any trust, whether of real or personal property, created under the laws of New York, alienable, because any beneficiary or group of beneficiaries may buy in the remainder, execute the release above mentioned, and become owner of the fee or absolute title in possession. The effect of Section 83 upon the rule against perpetuities has been explained in *Mills v. Mills* (50 App. Div., 221), decided in April, 1900. Real estate was devised in trust, the income to be divided among four beneficiaries and their survivors, and after the death of the last survivor the legal fee was to vest in a corporation. The Court held that this did not violate the rule against perpetuities because the property could be alienated at any time by the united action of the beneficiaries and the remainderman, as described above. In *Beardsley v. Hotchkiss* (96 N. Y., 214) 1884, there was a devise to a son for life, with contingent remainders to other children. It was argued that alienation was suspended because the children could not alienate to strangers, but the Court held that as the children could release to the son, and he could then convey the fee, there was no suspension whatsoever of the power of alienation.

What, then, is the effect of the principal case? There are only

two sections of the Real Property Law restricting the creation of estates in New York—§ 32 declares that every future estate shall be void which suspends the power of alienation for more than two lives in being; § 33 declares that not more than two successive legal life estates in realty shall be valid; § 33 has nothing to do with the rule against perpetuities, as it deals only with *vested alienable* estates. This must be true whether the rule is intended to prevent inalienability, or, as Prof. Gray says, is a rule directed against remote vesting (Gray on Perpetuities,) § 32, then, embodies the whole New York rule against perpetuities, and declares it to be a rule against suspending alienation. According to this rule the power of alienation cannot be suspended for more than two lives in being at the time of the creation of the estate, except that a contingent remainder in fee may be created to take effect at the termination of two lives and during the minority of a third life.

Our principal case decides that under the provisions of Section 83 all trusts may be terminated, and so the power of alienation is not suspended where the remainder is vested in a person in being who can convey his interest to the *cestuis que trustent*. The far-reaching effect of this decision upon the New York rule against perpetuities is obvious. It would seem to follow that hereafter the rule against perpetuities can be violated only when there is a contingent remainder created in favor of unborn issue, and that it will be possible to create trusts to endure for any number of lives in being if the right to the ultimate remainder is in a person or corporation which can convey to the *cestuis que trustent*. The decision, also, does away with the erroneous holdings in *Killam v. Allen* (52 Barb., 605), 1868, and *Williams v. Lands* (74 Hun, 425), 1893, which confuse the probability that property will not be alienated with inability to alienate.

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**BANKRUPTCY—PREFERENCE—PROOF OF REMAINDER OF CLAIM BY INNOCENT PREFERRED CREDITOR.**—The supposed intention of the Bankruptcy Act of 1898 is the real and effectual equality in the distribution of the bankrupt's estate. *Lowell on Bankruptcy*, page 43. In the disposition among creditors equality is equity. *Bank v. Sherman* (101 U. S., 403) 1879, *Buller Co. v. Robbins* (151 Ill., 632) 1894, *Collier on Bankruptcy*, page 286. Hence, one of the chief purposes of the Act seems to be to prevent any one creditor from obtaining a greater percentage of his claim than any other creditors of the same class. Secs. 1 (25), 3a, 57g, 60a, b, 70.

If the debtor makes a payment at a time when he is not in fact insolvent, however soon he may afterwards become insolvent, this payment is in no sense a preference. Therefore, the fact of insolvency at the time of the payment must first be proved before the question of preference arises. *In re Alexander* (4 Am. B. R., 376), Georgia, May, 1900. *Blakey v. Bank* (2 Am. B. R., 459, Indiana).

But if the fact of the debtor's insolvency at that time is established, any payment by him falls under the letter at least of Sec. 60 (a): "if *being insolvent*, he has made a transfer of any of his

property," etc. When the creditor knows or has reason to believe that he is preferred, this preference can be avoided at the option of the trustee. But that power in the trustee is limited to those preferences only, which occur within four months before the filing of the petition. Sec. 606. Does Sec. 57g, prohibiting the proving of claims by creditors who have received a preference, refer only to such preferences as would be thus avoidable by the trustee? Since Sec. 60a declares a preference any payment made while the bankrupt was in fact insolvent, and Sec. 57g refers to preferences generally, it is but fair to infer that Congress intended Sec. 60a to explain the word preference used in 57g. In the Act of 1867 Congress explicitly stated that a provision similar to 57g should apply only to preferences made with connivance or knowledge of creditors. With this section before them, Congress, in framing the Act of 1898, failed to insert that limitation in Sec. 57g, and, when defining preferences, again failed to make this distinction, although they were fully aware of it, because in Sec. 606 they limited the trustee's power of avoiding to those preferences only, which were known or should have been known to the creditor to be preferences. Thus, the Act itself shows clearly that limitations of Sec. 57g were purposely omitted, for Congress had in mind the positions, both of the innocent and guilty preferred creditor. *Electric Co. v. Worden*, 3 (Am. B. R., 634), Indiana, 1900.

Accordingly, it has been held that an innocent preferred creditor cannot prove the remainder of his claim if he retain his preference. A payment of money is considered a "transfer of property," defined in Sec. 1 (25); and such a transfer of property would, if the creditor might prove the remainder of his claim, allow the insolvent to pay the creditor a greater percentage of his claim than to other creditors. *In re Knost* (2 Am. B. R., 153), Ohio, 1899; *in re Conhaim* (3 Am. B. R., 249), Washington, 1899; *Strobel v. Knost* (3 Am. B. R., 631), Ohio, 1900.

It might be that a mere retention by the creditor of his preference would violate the principle of equality in the distribution of the bankrupt's estate. But the Act of 1898, unlike the English Act of 1861, *Petty v. Cooke*, L. R. (6 Queen's Bench, 792), does not enable the trustee to prevent this. When, however, the preferred creditor asks the Court to assist him in obtaining a greater proportion of his claim by permitting him to prove the remainder, he is asking the Court to do that which is plainly to result in a violation of Sec. 60a.

The United States Court for the Southern District of New York, *In re Leopold Smoke*, August, 1900, distinguishes from these cases, that in which a preference is given at a time when the debtor was in fact insolvent, but the insolvency was unknown, both to debtor and creditor. If there has been a "transfer of property," the debtor at the time "being insolvent," the creditor has been preferred regardless of the knowledge of either party, and 57g applies. From the creditor's point of view, there is just as good reason, when he receives payment of a *bona fide* debt, for him to retain the money

whether the debtor intended a preference or not so long as the creditor is innocent. In either case, it is equally within Sec. 60a. Likewise, there is no less inequality in the distribution. In fact, we fail to find any argument showing the innocent creditor's higher equity when the debtor undesignedly prefers him.

Strictly speaking, the payment might be much less than the creditor would receive were he to return the money, prove his whole claim, and take his *pro rata* share. Not until this apportionment is made among the creditors can it be said that the payment gives him a greater percentage of his claim; and if that cannot be asserted, how is he, within the meaning of Sec. 60a, a preferred creditor? If he is not such, why should he not be allowed, at least, an equal percentage of his debt, for Sec. 57g does not then apply to him? As he must by the act prove or not prove the remainder of his claim, the Courts, realizing the inequality in allowing him to prove, construe the words in Sec. 60a, defining preference as "a transfer of property," "the effect of which will enable any one creditor to obtain a greater percentage of his debt," to mean that, if the creditor insist on the transfer, and then prove the remainder of his claim, he would be getting a greater percentage and would become a preferred creditor within Sec. 60a. Thus, in order to prevent him from becoming a preferred creditor, they really treat him as such, and apply to him Sec. 57g.

But the creditor to whom money has been paid by a debtor, at the time insolvent, may return this money and prove his whole claim. He, consequently, has the privilege of judging for himself as to which method would yield him the larger proportion, and this certainly more nearly approaches an equitable distribution than would result were the creditor to prove the remainder of his claim, and also retain that which, after such a proof of claim, would undoubtedly constitute a preference under Secs. 60a and 57g.

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EFFECT OF MODERN LEGISLATION ON TENANCY BY THE ENTIRETY.—Such tenancy arises at common law when a conveyance is made to husband and wife during coverture, which, if made to two strangers would create a joint tenancy. Its peculiarities arose from the identity which the common law conceives to exist between husband and wife (Littleton, Sect. 291). In such tenancy a husband cannot bar the wife's right by survivorship in any part.—*Doe v. Parrel* (5 T. R., 652 at 654). They are accordingly said to hold *per tout et non per my* (Chailis' Real Prop., p. 304), so that partition cannot be made of the estate (1 Prest. Est., 135). Lord Coke does not use the phrase "by entireties." He speaks of joint estates where "the husband and wife shall have no moieties"—a kind of inseverable joint tenancy. The earliest American edition of Blackstone makes no mention of tenancy by the entirety, though what is apparently a subsequent insertion (Bk. II., p. 182) is often referred to, and Chancellor Kent in a note (IV. Kent Com. 363) says that "Mr. Ram, in his Outline of Tenure and Tenancy (pp. 170-174), differs

from all the great property lawyers in saying this is a species of joint tenancy."

It would seem natural that a tenancy so nearly related to joint-tenancy would have disappeared after the legislation directed against the latter. It would surely seem that the Married Women's Acts would so far destroy the fictitious identity of husband and wife, as to eliminate tenancy by the entirety, *Mander v. Harris* (24 Ch. Div., 222); *Thornley v. Thornley*, 1893, 2 Ch., 229. The American courts, however, have not generally so held (1 Wash. R. Prop., Chap. XIII). The New York cases have been particularly interesting. In *Meeker v. Wright* (76 N. Y., 262), the Court was of opinion that the status of coverture had been so far changed as to destroy tenancy by the entirety. On this dictum *Feely v. Buckley* (28 Hun, 451), and other cases, were decided, but were overruled by *Bertles v. Nunan* (92 N. Y. 152), which held that when husband and wife were grantees of a freehold, they took as tenants of the entirety. *Zorn-tlein v. Bram* (100 N. Y. 10) held that in such case the grantee from the wife had no claim whatever as against a subsequent grantee from the husband and wife jointly. In *Price v. Pesika* (54 App. Div., 59), decided Nov. 10, 1900, the Court said that husband and wife took as tenants of the entirety, notwithstanding §56 N. Y. Real Prop. Law, which declared that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy."

The tenancy seems to have been destroyed in *England, Canada, Ala., Me., Mass., Minn., Miss, and N. H.*, though still remaining in *Ark., D. C., Ind., Kansas, Md., Mich., Mo., N. J., N. Y., N. C., Ore., Pa., S. C., Tenn., Vt., and W. Va.*

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CORPORATIONS—VOTING TRUSTS.—In *Taylor v. Griswold* (2 J. S. Gr., 222), 1833, the Court denied the right of a stockholder to vote by proxy, unless power to do so had been expressly or impliedly conferred by the Legislature, on the ground that each stockholder is expected to exercise his individual judgment. In *Cone v. Russell* (48 N. J. Eq., 208), 1891, this principle was applied to a proxy irrevocable for five years, but great stress was laid on the fact that the object to be attained was against public policy, referring to *Woodruff v. Wentworth* (133 Mass., 309), 1882, where an ordinary contract between two stockholders for a similar purpose was held void. *White v. Tire Co.* (52 N. J. Eq., 178), 1894, was an agreement to transfer stock to a trustee for ten years in exchange for certificates of deposit, the trustee to vote as one of the beneficial owners should direct. Upon transfer by the latter of his beneficial interest the agreement was held void as to the transferee, it being against public policy for one without interest or title to vote the stock (citing *Shepang Voting Trust Case* (60 Conn., 553), 1891, at pages 580, 587. In *Clowes v. Miller* (see RECENT DECISIONS) the holding was substantially the same, the agreement being upheld only until the transfer, but a distinction was expressly drawn between



such an agreement as was there in question, and a mere "voting trust." This was shortly followed by *Kreisel v. The Distilling Co.* (see RECENT DECISIONS). The Chancellor made no reference to *Clowes v. Miller*, but rested his decision on *Taylor v. Griswold*, *Cone v. Russell* and *White v. Tire Co.* Held, that where a proxy is revocable, the stockholder sufficiently retains the power to exercise his individual judgment within the doctrine of *Taylor v. Griswold*. But if the grant of power is irrevocable and for a fixed time, then its validity must depend on the purpose for which it is given. A like doctrine is applicable to the creation of a trust and the appointment of a trustee to whom the title of the stock is conveyed. A distinction is drawn between a voting trust to provide for the carrying out of a plan already formulated by the stockholders in the exercise of their own judgment, as against one both to formulate and carry out (see, also, *Shepard Voting Trust Case*, *supra*). In this case it will be noted that there was no question of the transfer of the equitable interest, or of the right to direct the voting being intended to be personal to the transferor.

## RECENT DECISIONS.

HAROLD WALKER, *Editor-in-Charge.*

AGENCY—BROKER'S DUTY TO REPORT NAME OF PURCHASER.—Defense, to suit for commissions, that broker did not disclose the name of the purchaser of realty. Held, inasmuch as defendant has not shown that this knowledge would have influenced her conduct, nor that plaintiff had any interest in the matter, plaintiff could recover. *Veasey v. Carson* (58 N. E. [Mass.]), Oct. 19, 1900.

This case sets a reasonable and just limit to the doctrine that it is the duty of the agent to give the principal notice of facts material to the agency, or which might influence the principal in his actions. *Harvey v. Turner* (4 Rawle [Penn.], 223), 1833; *Arrott v. Brown* (6 Whart. [Penn.], 9), 1840; *Devall v. Burbridge* (4 Watts & Serg. [Penn.], 305), 1842; *Moore v. Thompson* (9 Phila., 164), 1873; *Murray v. Beard* (102 N. Y., 505), 1886; *Hegenmyer v. Marks* (37 Minn., 6), 1887. In *Rich v. Black & Baird* (173 Pa. St., 92), the failure to disclose the real purchaser barred recovery because the agent himself was the real purchaser, and, of course, had an interest; and in *Humphrey v. The Eddy Transportation Co.* (65 N. W., 13 [Mich.]), 1895, the antagonistic interest of the agent was proven.

AGENCY—REAL ESTATE AGENT—SCOPE OF AUTHORITY.—Held, that a real estate agent acting under instructions to sell cannot bind his principal by entering into a contract to sell the property. *Armstrong v. Oakley* (62 Pac. Rep., 499 [Wash.]), Oct., 1900.

In the construction of an agent's powers in the purchase and sale of real estate a stricter interpretation prevails than in the case of chattels. Where the agent is a professional broker, the rule of the principal case produces a satisfactory result, since the middleman's duty may be considered as discharged when he has introduced to the owner a person who subsequently purchases the land. *Desmond v. Stebbins* (140 Mass., 339), 1885. However, when a clear intent that the agent shall do more than this is expressed, power to enter into a binding contract on behalf of the principal would seem to be of the essence of the authority, the agent not being able to execute a conveyance because of the Statute of Frauds.

*Haydock v. Snow* (40 N. Y., 363), 1869. In several of the States which hold that authority to sell land necessarily includes the power to bind the principal by contract, the Statute of Frauds requires that the agent's authority be in writing.

**BILLS AND NOTES—PAROL EVIDENCE—COUNTERCLAIM.**—Action on a promissory note. Defendant pleaded as a counterclaim, (1) that the note was given in payment for certain shares of stock under the agreement, that whenever defendant should desire to return the said stock, the plaintiff would repurchase it by delivering up the note; (2) that the defendant had offered to return the stock and had demanded the note, but without success. Plaintiff objected to evidence being given under this plea, alleging that it tended to vary the terms of the note. *Held*, that the evidence was admissible. *Germania Bank v. Osborne* (83 N. W., 1084). Supr. Ct. of Minn., Oct. 25, 1900.

The evidence offered in support of the counterclaim tended to make out a case which would defeat the collection of the note, but it did not tend to change its terms. If payment could be enforced at all, it must be according to the terms of the note. But there was, under the issue tendered by the counterclaim, the question of the right to enforce payment of the note. The distinction between a defense and counterclaim was made in *Manufacturing Co. v. Potts* (59 Minn. 240; 61 N. W. 23), 1894. *Allen v. Furbish* (4 Gray, 504), 1855, and *Hatch v. Hyde* (14 Vt., 25), 1842, are to be distinguished from the present case. In both of those cases, evidence of collateral agreements was excluded; but there the agreements were pleaded as defenses in bar to the action.

**BANKRUPTCY—PREFERENCE—INNOCENCE OF BOTH CREDITOR AND DEBTOR—CREDITOR'S ABILITY TO PROVE BALANCE OF HIS CLAIM.**—Payment of money by debtor who was later shown to have been insolvent, but was ignorant of the fact at the time, to a creditor who was unaware that the payment was a preference. *Held*, not to be such a preference as to bar the creditor from proving the remainder of his claim, under SECTS. 57*g* and 60*a*. The court distinguishes this case from *Electric Co. v. Worden*, on the ground that in the latter case the debtor knew of his insolvency and intended to make a preference, while here he had no such intention. *In re Smoke* (4 Am. Bank R., No. 3, 434), August, 1900. SEE NOTES.

**BANKRUPTCY—PREFERENCE—INNOCENCE OF CREDITOR—ELECTION TO RETAIN PREFERENCE, OR RETURN AND PROVE CLAIM.**—A payment by an insolvent debtor on account to a creditor, within four months prior to the adjudication in bankruptcy, the creditor having no knowledge of any attempt to give him a preference. *Held*, this was a preference under SECT. 60, the enforcement of which would grant to one creditor a larger percentage of his claim than to any other. Although the trustee could not avoid this preference because the creditor had no knowledge of it, still, by SECT. 57*g*, the creditor will be barred from proving the remainder of his claim, if he retains this preference. *In re Fixen & Co.* (4 Am. Bank R., No. 1, page 10), May, 1900. SEE NOTES.

**COMITY—RIGHT OF FOREIGN RECEIVER TO SUE.**—The receiver of a Minnesota corporation brings suit in Iowa to foreclose a mortgage in his own name "as receiver of," etc. Plaintiff alleges that the note and mortgage were duly assigned to him after his appointment as receiver. *Held*, on demurrer for want of capacity to sue: that a foreign receiver cannot sue without express statutory authority to do so; but even where the doctrine of comity is not recognized as to litigants in a representative capacity, the assignee of property may maintain an action as of right. *Cole v. Cunningham* (133 U. S., 107), 1890; *Toronto General Trusts Co. v. C., B. & Q. R. Co.* (123 N. Y., 37), 1890. The words "as receiver," etc., might be treated as descriptive of the person merely, and not as an essential part of the pleading. Demurrer overruled. *Hale v. Harris et al.* (83 N. W., 1046), Supr. Ct. of Iowa, Oct. 25, 1900.

**CONSTITUTIONAL LAW—NATURALIZATION OF PORTO RICANS—SUFFRAGE.**—*Held*, the Treaty of Peace with Spain does not naturalize Porto

Ricans, in the absence of congressional action. Hence, they are not citizens of the United States, and have no right of suffrage.—*The People of the State of New York ex rel. Frank Juarbe, Relator, v. The Board of Inspectors, etc.* (32 Misc. 584), Oct., 1900. SEE NOTES.

CONTRIBUTORY NEGLIGENCE.—Plaintiff received injuries in an attempt to save her three-year-old child from being run over by defendant's car. *Held*, contributory negligence not shown, even though the child was in a city street unattended. *West Chicago Street Ry. Co. v. Liderman*, (58 N. E., 367 [Ill.]), Oct. 19, 1900.

It is not negligence *per se* to allow a young child to be in a city street unattended, *Chicago v. Major* (18 Ill., 349), 1857; *Birkett v. Ice Co.* (110 N. Y., 504), 1888; *Creed v. Kendall* (156 Mass., 291), 1892; *McNeil v. Ice Co.* (173 Mass., 577), 1899, and this is true regardless of the question whether its parents are sufficiently well-to-do to provide an attendant. *Fox v. Railway Co.* (118 Cal., 55), 1897; *Hagan's Petition* (5 Dill., 96), 1879; *Mayhew v. Burns* (103 Ind., 328), 1885; *Ry. Co. v. Pitzer* (109 Ind., 179), 1886, though the poverty of the parents has been thought important in some cases. Beach on Contributory Negligence and cases there cited. *Hedin v. Ry. Co.* (26 Ore., 155), 1894.

When human life is in danger the law will not impute negligence to one who attempts a rescue, if he does so with a reasonable expectation of success. *Eckert v. R. R. Co.* (42 N. Y., 562), 1870.

CORPORATIONS—POOLS AND VOTING TRUSTS.—Agreement between majority of stockholders of defendant corporation and certain trustees. Stockholders to transfer their stock and entire legal title thereto for five years, to the trustees named, who were given power to formulate and put into effect a plan to increase the capital of defendant company. Application by minority stockholder for preliminary injunction restraining trustees from voting stock. *Injunction granted. Held*, the agreement is contrary to public policy, in that it provides for management of the corporation, during a fixed period of time, by the judgment of others than stockholders. *Kreisel v. The Distilling Co. of America*.—(In Chancery of N. J.)—Oct. 1900. SEE NOTES.

CORPORATIONS—RESERVED POWER OF REVOCATION OF CHARTERS—DARTMOUTH COLLEGE CASE—Three recent cases in Delaware have held that the clause of the State Constitution of 1831, which authorizes the Legislature simply to *revoke* charters granted to corporations, without giving authority to alter or amend, gives the right to the Legislature to revoke any part of a charter—any separate franchise, or part of a franchise. *Wilmington City Railway Co. v. Wilmington & B. S. Railway Co.* (46 Atl. 12), May, 1900; *Same v. People's Railway Co.* (47 Atl. 246), Oct., 1900; *Mayor of Wilmington v. Addicks* (47 Atl. 366), Oct., 1900.

A charter, considered as a contract between the State and the corporation, can be, in absence of legislative provision, revoked or altered only by agreement of the parties. The Constitution has provided that the contract may be revoked, without providing for possible alteration. The cases cited hold that the power of revocation includes the power of alteration.

Whatever objection to this holding may be found, it is certainly within the power of the Legislature to alter the contract through the power to revoke. For revocation may at any time follow a refusal to accept alterations. This makes superfluous the decision that the clause gives the Legislature, at once, two powers, of revocation and alteration.

CORPORATIONS—RESERVED POWER OF REVOCATION DISTINGUISHED FROM RIGHT TO REVOKE FOR ABUSE OR NON-USER.—The Constitution of 1831 gave the Legislature the right to revoke corporate charters. The Constitution of 1897 stipulated that revocation for abuse or non-user of corporate franchises should be effected only in the courts at the suit of the Attorney-General. Plaintiff corporation contends that the act granting defendant corporation a franchise along streets in which plaintiff had an exclusive franchise is unconstitutional, as the proper steps have not been

taken through the courts. *Held*, the clause of the Constitution of 1897 did not deprive the Legislature of its right to revoke without cause. *Wilmington City Ry. vs. People's Railway Co.* (47 Atl. 246), Oct., 1900.

The result of this decision is a further strengthening of the efficacy of the revoking clause of the Constitution of 1831.

**CORPORATIONS—STATUTE AUTHORIZING CUMULATIVE VOTING INCLUDED IN GENERAL RESERVATION BY STATE OF POWER TO AMEND CHARTER.**—By the Constitution of Michigan of 1850, Art. 15, § 1, "Corporations may be formed under general laws. All laws passed pursuant to this section may be amended, altered, or repealed." In 1870 the Michigan Mutual Life Insurance Company was organized under such a law authorizing the company to prescribe the manner of electing directors. In 1885 the Legislature passed an act authorizing cumulative voting for directors in contravention of the charter and by-laws of the company. The plaintiffs exercised this right and claimed a seat on the board. *Held*, for the plaintiffs. *Looker v. Maynard* (21 Sup. Ct. Rep. 21), Sup. Ct. of U. S. Nov. 15, 1900.

It has been repeatedly held that the reservation of a general power to alter, amend, or repeal, gives the right to make any such alteration or amendment as will not impair the object of the grant or any right vested under the grant. *Miller v. New York* (15 Wall. 478), 1872, upheld the constitutionality of a statute authorizing the City of Rochester to change the number of directors in a railroad company, though the dissenting opinion held the agreement modified was between third parties, outside of and collateral to the charter, and hence beyond the legislative power to amend. That case cannot be distinguished in principle from the case at bar.

In *State v. Greer* (78 Mo., 188), 1883, there was no such general reservation of the power to amend, and a statute altering the voting power of the shareholders was deemed unconstitutional.

**CORPORATIONS—STOCK IN TRUST—RESERVATION OF RIGHT TO VOTE IN CESTUI QUE TRUST—EFFECT OF TRANSFER OF CESTUI QUE TRUST'S INTEREST.**—Where plaintiffs A and B gave their stock to X, in trust, B retaining the right to vote the shares, *Held*, a transfer by B of his interest, to defendant, does not give to defendant B's right to vote the shares, which was purely a personal right. *Clowes v. Miller* (47 Atl., 845), N. J., Chancery, 1900.

The deposit in trust here was not simply a deposit for voting, or "voting trust," but a trust for certain purposes of ultimate disposal. Hence, in the absence of any express provision in the trust agreement, the trustee would have the power of voting. A provision similar to that enabling B to direct the voting, he being a joint, equitable owner, has been held valid and not against public policy, *Hey v. Dolphin* (36 N. Y. Sup. 627, and cases cited, page 632), 1895; *Chapman v. Bates*, N. J. Ch. (46 Atl. 591), 1900. But the right was intended to be purely personal to B, under the terms of the trust, and it could not therefore be transferred to defendant. On the other hand, it has been held that an irrevocable power of voting or directing the votes on stock cannot be vested in a person who is neither interested in the stock nor a representative of persons interested. *White v. Tire Co.* (52 N. J. Eq. 178, and 28 Atl. 75, and cases cited), 1893.

**EQUITY—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.**—Defendant, a physician, in consideration of \$100, entered into a written agreement to sell his good will and to refrain from practicing in the vicinity. In a suit to restrain the defendant from practicing, *Held*, the defendant could not set up breach by the complainant of an oral agreement to buy defendant's house, \$900, treating the \$100 as part of the purchase-price. Injunction granted. *Lemon v. Randall* (83 N. W. 994), Supr. Ct. of Mich., Oct. 31, 1900.

Parol evidence would have been admissible to show that by fraud, mistake, or surprise the written agreement did not contain the real terms (2 White & T. Lead. Cas. Eq., pp. 929, 496); *Chambers v. Livermore*

(15 Mich., 381), 1867. But the court will not refuse specific performance unless it be satisfied that the written agreement would not have been entered into if its true effect had been understood. *Watson v. Marston* (4 DeGex, M. and G., 230), 1853. In the present case defendant signed the writing with a full understanding of its terms. There was no mistake. The oral agreement, therefore, was simply void under the Statute of Frauds.

**INSURANCE—EFFECT OF CLAUSE IN POLICY DEFINING THE LOCUS OF THE CONTRACT.**—A clause stipulated that the policy should be interpreted by the Laws of New York. A statute of Missouri, where the policy was taken out, conflicted with the Laws of New York. *Held*, Missouri laws apply. *New York Life Insurance Co. v. Cravens* (20 Sup. Ct. Rep. 962), May 28, 1900.

In *Equitable Life Insurance Co. v. Clements* (140 U. S. 226), 1890, this particular Missouri statute was held mandatory. A State may prescribe rules by which foreign corporations shall do business; its limitations upon the power of contracting are conditions of the permit and accepted with it, except where the corporation rests its right upon the Federal nature of its business. *Waters-Pierce Oil Co. v. Texas* (177 U. S., 28), 1899. Such a policy of life insurance is not an interstate contract so as to be entitled to immunity from State control, nor is the business of life insurance interstate commerce. In *Philadelphia Fire Asso. v. New York* (119 U. S., 110), 1886, it was held that fire insurance, and in *Hooper v. California* (155 U. S. 648), 1894, that marine insurance, were not interstate commerce.

**INTERNATIONAL PRIVATE LAW—CARRIAGE BY SEA—HARTER ACT—EXEMPTION OF NEGLIGENCE.**—Goods shipped in an English vessel from Buenos Ayres for New York under bills of lading exempting carrier from liability for negligence and stipulating that the law of the ship's flag should govern the contract. In an action for damage to cargo, *held*, under Harter Act of 1893, Chap. 105, § 1 [27 Stat. at L., 445], United States courts could give no validity to exemptions from negligence, and must apply their own law, irrespective of the contract of the parties, in all cases of voyages "from or between ports of the United States and foreign ports." *Knott v. Botany Worsted Mills* (21 Sup. Ct. Rep. 30).

This was a case of first impression in the Supreme Court (GRAY, J. at p. 31), and it was unfortunate that it should have turned entirely on the construction of a statute. In effect the courts decided that any rules of international private law which might have governed such a contract were done away with by the statute and the *lex fori* alone made applicable. In the absence of any statute the result would probably have been different [see remarks of GRAY, J., in *Liverpool S. S. Co. v. Phenix Ins. Co.*, 129 U. S. at page 458], though the tendency of the lower courts had always been to apply the *lex fori* in such cases whether there was a stipulation for foreign law or not. *The Brantford City* (29 F. R. 373), 1886; *Lewisohn v. Nat'l S. S. Co.* (56 F. R. 602), 1893; *The Energia* (56 F. R. 124), 1893; *The Guild Hall* (58 F. R. 796), 1893. There was, however, a strong case the other way in *The Oranmore* (24 F. R., 922), 1885.

**MASTER AND SERVANT—DUTY TO INSTRUCT—ASSUMPTION OF RISK.**—Plaintiff had been assigned to duty as a regular brakeman. The head switchman knowing his inexperience set him to make a coupling. Plaintiff was injured in the attempt. *Held*, that the Master knowing that particular skill was required which servant had not, and the danger not being apparent because of such inexperience, the risk was not assumed. *Louisville & N. Ry. Co. v. Miller* (104 Fed. 124). October 2, 1900.

An identical state of facts arose and this principle was applied in the *Ill. Central R. R. Co. vs. Price* (18 So. 415 [Tenn.]), March 25, 1895.

The case accords with the great weight of authority, established by a long line of decisions in New York, Massachusetts, Indiana, Vermont,

Mississippi, Wisconsin, Maine and Texas. *Contra, Dysinger vs. Railway Co.* (93 Mich., 646), 1892. *McDermott v. R. R. Co.* (56 Kas. 319), 1899.

**MORTGAGES—FUTURE ADVANCES—PRIORITY OF LIEN.**—A mortgage recited it was given to secure a certain note, and in case grantor became further indebted to grantee, to secure other notes to be given by him. Thereafter mortgagee received of mortgagor another note for sums lent after first mortgage, and a new mortgage to secure it. Between dates of the two mortgages, one King obtained mechanics' lien on premises without knowledge of any transactions except as appeared by first mortgage. Mortgagee had no knowledge of King's employment. *Held*, as against King the second mortgage was ineffectual, and the first secured nothing but money lent before its execution. The mortgage should have shown an agreement to make the future advances and named amount to which they might be made. No duty of inquiry rested on King. *Balch v. Chaffee et al.* (47 Atl. 327). Sup. Ct. of Conn., Nov. 1, 1900.

This case represents the peculiar Connecticut doctrine. In general the first mortgage would be held to cover future advances until notice of subsequent lien to the mortgagee. (Jones on Mortgages, § 367, 368, and cases cited.) In *Pettibone v. Griswold*, (4 Conn. 162), 1822, and *Stoughton v. Pasco* (5 Conn. 448), 1823, such a mortgage was held void, as against creditors, for indefiniteness, as giving no reasonable notice of the encumbrance; and in *Shepard v. Shepard* (7 Conn. 387), 1828, a provision for future endorsements was held ineffectual as against a subsequent encumbrancer notwithstanding a stipulation that the notes endorsed should not at any time exceed \$1,200. *North v. Belden* (13 Conn., 381), 1388, *accord*.

**MORTGAGES—PRIOR UNRECORDED CHATTEL MORTGAGE VALID AS AGAINST SUBSEQUENT MORTGAGEE WITH NOTICE—BURDEN OF PROOF—INSOLVENCY—PREFERRED CREDITORS.**—X mortgaged certain goods to A, but the mortgage was not recorded until after X had mortgaged the same goods to B (who had notice of A's mortgage) and made a general assignment for the benefit of creditors to Y. *Held*, that A has a prior lien; the burden was on B to prove that he took his mortgage without notice of A's prior mortgage. *Diemer v. Guernsey et al.* (83 N. W. 1047 [Iowa]), Oct., 26, 1900.

The burden of proving he is within the class against whom a prior unrecorded mortgage is invalid by statute (Code of Iowa, 1897, Sec. 2906) is here properly made to rest upon the second mortgagee. Under a similar statute in New York (N. Y. Rev. St., 9th Ed., p. 2013) a similar result has been reached. *Button v. Rathbone* (126 N. Y., 187, 192), 1891. But the burden of proving such notice has been held to rest upon the holder of a prior unrecorded mortgage of real estate. *Barnett v. Squyres* (54 S. W., 241 [Tex.]), 1899.

**QUASI CONTRACT—RECOVERY OF MONEY PAID IN MISTAKE OF LAW BY AN AGENT.**—Recovery allowed in a suit by the United States to recover money paid to an army officer by a paymaster through a misinterpretation of an Article of War. *United States v. Dempsey* (104 Fed. 197), Sept., 1900.

The cases cited in the opinion all lay it down as a principle that the government may recover money paid under a mistake of law made by one of its agents. *McElrath v. U. S.* (102 U. S. 441), (26 L. Ed. 189), 1880; *Wisconsin Cent. R. Co. v. U. S.* (164 U. S. 190), (17 Sup. Ct., 45), (41 L. Ed., 399), 1896. Such a payment, by an agent acting under a statute is like any payment by an agent acting in excess of his authority, and cannot bind the principal whether the principal is the government or a private individual. The defense of payment under mistake of law is available only when the mistake was the mistake of the plaintiff, and where the mistake was made by the plaintiff's agent, the plaintiff can be held only on the principle of estoppel. But an agent cannot be said to have been held out to the world as having authority to pay money in mistake of law, and the defendant, who has received such payment cannot be said to have been injured by reliance on plaintiff's representations. The decision is

sound, but should not be confined to cases where a government agent has made the mistake of law. *Whiteside v. United States* (93 U. S. 247), 1876; *Hawkins v. United States* (96 U. S. 689), 1877; *United States v. Burchard* (125 U. S. 176), 1888.

**REAL PROPERTY—ESTATE BY THE ENTIRETY IN NEW YORK.**—A freehold estate is granted to husband and wife. *Held*, that they take as tenants of the entirety, notwithstanding Section 56 New York Real Property Law, which declares that "every estate granted" "to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy." *Price v. Pestka*, Nov., 1900 (54 N. Y. App. Div., 59). SEE NOTES.

**REAL PROPERTY—TRADE FIXTURES—AS BETWEEN TENANT AND MORTGAGEE.**—X leased his land to A, selling him a two-third interest in a greenhouse upon it; and subsequently he mortgaged the land to B, who had no notice of the sale of the greenhouse. Before his lease had expired A had it renewed with the privilege of removing the greenhouse at the end of the term; and now, during A's second term, B sues to foreclose the mortgage. *Held*, that A may remove the greenhouse, since it was a trade fixture, and X treated it as personalty; and *held* that A did not lose his right to remove by failure to exercise it at the end of his first term. *Royce v. Latshaw* (62 Pac. 627), Colo., Oct., 1900.

Certainly the fact that the greenhouse was a trade fixture would have been a good defense as against the landlord. *Grymes v. Boweren* (6 Bing., 437), 1830; *Updegraff v. Lesem* (62 Pac. 342), Colo., 1900. And such fixtures do not pass to the landlord by the renewal of the lease. *Sumsch v. Kohn* (49 N. Y. Supp. 176), 1898; at least when the tenant expressly stipulates for the continued right to remove them. *Watriss v. Bank* (124 Mass. 571), 1878. But here it appears that the greenhouse was not annexed by the tenant nor during his term, so the case is not within the reason of the rule regarding trade fixtures.

And, at common law, an agreement by the mortgagor of the realty to regard fixtures as personalty is void as against the mortgagee. *Clary v. Owen* (15 Gray [Mass.], 522), 1860; *Porter v. Steel Co.* (122 U. S. 267); *McFadden v. Allen* (134 N. Y. 489), 1892; [but see *Ford v. Cobb* (20 N. Y. 344), 1859, and *Tift v. Horton* (53 N. Y. 377)]; at least where the mortgagee had no notice of the agreement. *Hunt v. Iron Co.* (97 Mass., 279).

**REAL PROPERTY—TRESPASS—ONE ASSUMING TO GRANT BY LEASE THE PROPERTY OF ANOTHER LIABLE FOR THE TRESPASSES COMMITTED BY THE LESSEE—DAMAGES.**—*Held*, where B, mining coal under a lease from A, has paid to A percentages for coal taken from C's land, which was negligently included in A's lease to B, B is not liable to C for the coal taken out, but A is liable, as he authorized the trespass. Measure of damages, the value of the coal after it was severed from the soil, but before it was carried to the mouth of the pit. *Donovan v. Coal Co.* (58 N. E. [Ill.], 290), Oct. 1900.

The decision is not put on the ground of any agency of B for A. For the general proposition that one who "authorizes," or, as the Appellate Court put it, "requests, or aids and abets" a trespass, no authority is cited. Inexact analogies, however, may be found in *Williamson v. Fischer* (50 Mo. 198), 1872; *Mallory v. Merritt* (17 Conn. 178), 1845; *Judson v. Cook* (11 Barb. [N. Y.] 642), 1852; *McMurtrie v. Stewart* (21 Pa. St. 322), 1853, and a dictum in *Ross v. Fuller* (12 Vt. at 271), 1839.

The measure of damages adopted is correct. *Wood v. Morewood* (3 Q. B. 440, note), 1842; *Martin v. Porter* (5 M. & W. 351), 1839; *Coal Co. v. Ogle* (82 Ill. 627), 1876.

**SURFACE WATER—ARTIFICIAL DRAINS—ADJACENT LANDS.**—The defendant, it is claimed, by a system of tile underdrainage increased the flow of surface water upon the plaintiff's adjacent land. *Held*, that the right of the owner of land to improve it is not restricted by any right in his neighbor to have his land free from the flow of surface water in unusual quantities. *Connell v. Stark* (83 N. W. 1092 [Wis.]), Oct. 30, 1900.

This holding was not called for by the facts, for the court here approved the finding that defendant's improvements "decreased the amount of surface water flowing from his land." Ignoring this, however, the decision finds support in *Gannon v. Hargadon* (10 All. [Mass.] 106), 1865, upon which it is rested by the court. See also *Cassidy v. R. R. Co.* (141 Mass. 174, 178), 1886; *Goodale v. Tuttle* (29 N. Y. 459, 467), 1864; *Barkley v. Wilcox* (86 N. Y., 140), 1881; *Bowlsby v. Speer* (2 Vroom, 351), 1865; *Eulrich v. Richter* (41 Wis. 318, 320), 1877; *Gibbs v. Williams* (25 Kan. 214), 1881; *Rawstron v. Taylor* (11 Exch., 367, 384), 1855. By the civil law the lower proprietor is bound to receive only so much surface water as flows naturally upon his land, and this rule has been adopted in several States. *Gillham v. R. R. Co.* (49 Ill. 484), 1869; *Ogburn v. Connor* (46 Cal. 346), 1873; *Martin v. Riddle* (26 Pa. St. 415), 1856; *Hays v. Hays* (19 La. 351).

**SURETYSHIP—CONSIDERATION NECESSARY TO SUPPORT AN ORIGINAL PROMISE.**—*Held*, promise by a wholesaler to continue to furnish wife of deceased with goods for the shop she took by her husband's will, and to forbear to press his claim, is not sufficient consideration to make the wife's promise to pay her husband's debts for goods furnished, an original promise. *Cardesa v. Bissop* (66 N. Y. Sup. 408), Nov. 15, 1900.

It is submitted that the decision is wrong. Plaintiff relinquished a right to attach the goods or to take out administration. This has been held to be sufficient consideration, moving directly between the parties (see *Browne* on the Statute of Frauds, § 190, and cases cited; *Ames*, Cases on Suretyship, p. 30, note 2); cf. also *Meriden Co. v. Zingsen* (48 N. Y. 247), 1871, and *Tomlinson v. Gill* (1 Ambler, 330), 1756; *Watson v. Randall* (20 Wend. 201), 1838 holds an agreement to forbear to sue a debtor a good consideration for the promise of a third person to pay the debt, but that the promise must be in writing.

**SUSPENSION OF POWER OF ALIENATION—NEW YORK RULE AGAINST PERPETUITIES IN EQUITABLE ESTATES.**—Real estate was devised in trust to divide the income equally among four beneficiaries and their survivors, after the death of the last survivor the fee to vest in a corporation. *Held*, the entire devise is valid. The rule against perpetuities is not violated. *Mills v. Mills* (50 N. Y. App. Div., 221), decided Apr., 1900. The dissenting opinions confuse impossibility of alienation with probability that the estate will not be alienated. SEE NOTES.

**WATER COURSES—RIPARIAN RIGHTS.**—The defendant, one of a number of salt manufacturers on a creek, by the operation of its works in the ordinary way and without negligence, has diminished the flow of water in the creek and polluted it, so as, to some extent, to deprive the plaintiffs, who are lower riparian owners, of its beneficial use. *Held*, that the plaintiffs' rights must be protected though they conflict with the profitable exercise of an important industry. *Strobel et al. v. Kerr Salt Co.* (164 N. Y. 303; 58 N. E. 142), Oct. 2, 1900. (Reversing 49 N. Y. Supp., 1144, [1897]).

This is an obvious application of the common law rule governing the rights of riparian owners. *Embrey v. Owen* (6 Ex. 353), 1851; *Rubber Co. v. Rothery* (132 N. Y. 293), 1892; 3 Kent Comm. 439-441. The few cases *contra*—*Barnard v. Sherley* (135 Ind., 547), 1893, and *Coal Co. v. Sanderson* (113 Pa. St. 126), 1886 (of which the latter rejects the rule when great industrial interests are involved)—are examples of judicial legislation, without support in principle, and at least questionable in policy.

**WILLS—CHARITABLE BEQUESTS—NOT VOID FOR INDEFINITENESS—TRUSTEES' POWER TO APPOINT.**—Testator left his property to his executor in trust to erect church buildings within a limited area and belonging to any of four denominations that trustee might appoint. *Held*, the gift was not void on account of indefiniteness of beneficiaries. *Trafton v. Black et al.* (58 N. E., 292 [Ill.]), Oct., 1900.

The court cited *Crerar v. Williams* (145 Ill., 525), 1893, and *Hoeffler v. Clogau* (171 Ill., 462), 1898, which are interesting as recognizing



that the Law of Charitable Uses (43 Eliz., C. 4), 1601, is the law of Illinois. It must also be considered to be that of New York, since the decision in *Allen v. Stevens* (161 N. Y., 122), 1899, interpreting Chap. 701 L. 1893, where PARKER, Ch. J., declared that the Legislature intended to restore that part of the Statute of Elizabeth relating to charitable uses which had been repealed by Ch. 46 of the Laws of 1788, and that consequently *Williams v. Williams* (8 N. Y., 525), 1853, is to be considered as representing the law of this State, and *Holmes v. Mead* (52 N. Y., 332), 1873, will be followed no longer.

**WILLS—CONSTRUCTION OF CLAUSE OF WILL.**—*Wilson v. Hays' Executors* (Nov. 1, 1900), 58 S. W., 773 Ky., the Court construed the following clause: "I devise to my beloved wife, for her natural life, the house, &c., \* \* \* and at her death to my daughter, Kate Wilson, but in the event she should die without having lawful issue of her body living, then said lands shall descend to my heirs at law," as giving a life estate to the wife, and, if Kate Wilson be living at the death of the wife, she gets the land in fee. The land goes to the heirs at law *only* in the event that Kate Wilson dies before the wife and leaves no issue of her body. *Wilson v. Hays' Executors* (58 S. W., 773 [Ky.]), Nov., 1900.

This is clearly erroneous. First: Kate Wilson gets a vested remainder in fee at once and not upon the contingency of her outliving her mother. Secondly: This vested remainder is liable to be divested upon her dying without lawful issue of her body living.

Whether she die before or after her mother makes no difference. The important fact to divest the remainder is that the condition subsequent be fulfilled. If it is not, the estate is not divested. The condition subsequent is that she die without lawful issue of her body living, and nothing else is necessary.

Divesting clauses are construed strictly. *Doe v. Cook* (7 East, 269), 1806; *Wall v. Tomlinson* (16 Ves., Jr., 413), 1810; *Doe v. Rowdin* (2 B. & Als. 441), 1819; *Vulliamy v. Huskisson* (3 Y. & C. 80), 1838; *Illinois Land & Loan Co. v. Bonner* (75 Ill. 315), 1874; *Grimball v. Patton* (70 Ala., 626), 1881.

**WILLS—DEVISE TO TAKE EFFECT IN ENJOYMENT IN FUTURE.**—Testator created a trust in his property, real and personal, to be terminated Jan. 1, 1900, the property to be then distributed among L. M. and his four children, in equal portions, in fee, but if any of the said children should die, leaving issue of his body, said issue to receive the same proportion that the parent would have been entitled to. One of the four children died in 1892, himself leaving children, and in 1897 another son was born to L. M. L. M. died before Jan. 1, 1900. *Held*, this son is entitled to share equally in the property. The share of L. M. passes to his intestate estate, and his widow has a statutory interest in that share, after distribution. *Mitchell v. Mitchell* (47 Atl. [Conn.], 325), Nov. 1, 1900.

The Court applies the general rule that where there is a gift and a direction to pay in the future, or to distribute, the legacy vests, unless some different intention is manifested. *Farman v. Farman* (53 Conn., 261), 1885, citing *Smith v. Edwards* (88 N. Y. 92), 1882. It does not affect the question of vesting that afterborn children are let in. *Haggerty v. Hockenberry* (52 N. J. Eq. 354), 1894. Where there was a bequest to trustees for a daughter for life, and after her death to pay the same to her children when they should attain twenty-one, it was held the legacy vested in the children at birth. *In re Bartholomew* (1 Mac. & G. 354), 1849. In *Goebel v. Froelich* (113 N. Y. 405), 1889, there was only a direction to divide at a future time, yet *held* the gift was vested, following the intent to be collected from the whole will.

## BOOK REVIEWS.

OUTLINE STUDY OF LAW.—By Isaac Franklin Russell, D. C. L., LL.D., Professor of Law in New York University. Third Edition. New York: Baker, Voorhis & Co. Pp. xix, 344.

The principal fault to be found with Professor Russell's little book is that it masquerades under a false title and in a deceptive garb. It should be bound in the green cloth of the essayist instead of law buckram, and should have been entitled, "Rambling Reflections of a Jurist," or "Scintillations from a Legal Luminary," instead of "Outline Study of Law." For it is neither a "study" nor an "outline" of law, nor can it possibly serve the purpose announced in the preface, "a first book in law and a general introduction to the whole body of American jurisprudence." Title, form and announced purpose apart, the little volume answers its real purpose well enough. No sage and serious-minded person looks for discipline in law or for exposition of legal doctrine to a course of lenten lectures delivered by a brilliant lawyer and wit to a women's law class, and in this compendium and syllabus of such a course nothing so serious and out of place as legal instruction is to be found. Instead, we have the easy discourse of a cultivated man, equally interested in books and in affairs, upon a great number of topics, some of them having to do with the law and more of them with the conduct of life; a philosophy not too profound, a learning not too high for human nature's daily food. And what a range! From strenuous living, as exemplified in the prize-ring and the football field, to the Austinian theory of sovereignty, from codification to contingent remainders, from the Pentateuchal jurisprudence to the Hague Conference of 1899. The lectures, as a whole, are decidedly clever, are smartly written, and, though superficial, are by no means flippant or trifling. If accuracy, instead of picturesqueness and raciness, had been a desideratum, the reference to the doubtful *jus primæ noctis* (page 260) might well have been omitted, and the good taste of certain passages on pages 305 and 330 is more than doubtful. There are minor inaccuracies enough, especially where accuracy is of the essence of the matter, as in the treatment of the feudal system; but the book is, in general, sound and reliable. There are many who like this sort of thing and many more who would be benefited and stimulated by it; and while it will drive no one to the serious study of law, it may well turn the general reader from his newspaper and magazine to the more inviting aspects of sociology, politics and jurisprudence. This, whether intended or not, is a real service and goes far to redeem the book from the reproach which its too pretentious title and aim must visit upon it.

HAND-BOOK OF THE LAW OF BILLS AND NOTES.—By Charles P. Norton, Lecturer on Bills and Notes in the Buffalo Law School.

Third Edition. By Francis B. Tiffany, St. Paul, Minn. West Publishing Co. 1900. Pp. x, 553.

The fact that this book has reached a third edition raises a strong presumption in its favor—a presumption which is not repelled by a careful examination of its contents. Its editors, however, do not claim for it the merit of originality. In his preface to the first edition, Professor Norton described the work as a collation “from the best text-writers and the leading cases” of “the most apt statements of those principles of negotiable bills and notes which will most frequently come before the student in his practice.” That edition, he also stated, was “intended, not for the practitioner, but only for students in law schools and law offices.” Although the present edition is intended for the practitioner as well as for students, Mr. Tiffany frankly acknowledges his obligations to his predecessors in this field of law, especially to Professor Ames, whose *Index and Summary* at the end of his great collection of cases is commended in terms of well-deserved praise. Whether, after such frankness, the editors were at liberty to appropriate the language of Professor Ames, without indicating by quotation marks or by reference to the *Summary*, that the language was his, is a question upon which there may be a difference of opinion. An example of the practice under discussion is found on page 29, where the following sentences are reproduced verbatim from page 827, Sec. 5 of the *Summary*; but without quotation marks or any reference to Professor Ames or the *Summary*: “A promissory note is a new obligation, and not simply evidence of an old obligation. An acknowledgment of indebtedness is evidence of an old obligation, but creates no new obligation.”

A rather novel feature of the first edition was sacrificed, when the work was changed from a treatise for students only to a handbook for practitioners as well. The problems appended to each chapter of the text for students' drill were expunged. In the place of these problems much new matter has been inserted with no little deftness, including a large array of citations; and the *Negotiable Instruments Law* has been printed in an Appendix. “At the suggestion of many teachers” we are told in the preface to this edition “The publishers have adopted the device of printing in bold type in the foot notes and text, the names of all cases there cited which are to be found” in the leading collections of *Cases on Bills and Notes*. This device has its advantages, but occasionally it gives to a page the appearance of suffering from a bad attack of hysterics.

In the very first section two blunders in dates arrest the attention of even a cursory reader. The statute of 3 and 4 Anne. C. 9, is ascribed to the year 1705 instead of 1704, and 20 Car. II, is referred to as 1868, instead of 1668. These errors are due probably to careless proofreading; but, to whatever cause ascribable, they do not tend to inspire confidence in the accuracy of the book. Barring errors of the character referred to, the work appears to be a trustworthy reproduction of the views of Ames, Chalmers and Daniels, with the addition of some authorities not cited by them.

READINGS IN THE LAW OF REAL PROPERTY.—An elementary col-

lection of authorities for students. Selected and edited by George W. Kirchwey, Nash Professor of Law in Columbia University. New York, Baker, Voorhis & Co. Pp. xxix, 555.

This is a collection of authorities on the elements of Real Property Law. The selections are taken partly from decided cases, partly from English and American statutes, and partly from the writings of those who have always been conceded as having the right to speak authoritatively on the subject. The readings are grouped under five main divisions. Book I defines the place of Real Property, contrasting the historical with the natural classification. Book II deals with the general subject of ownership, the short extract from Pollock and Maitland giving an unusually clear description of feudal tenure. Book III treats of Estates in Lands; Book IV discusses those rights less than ownership which have not already been classified under the preceding heads; and Book V deals with the creation and transfer of interests in land, not only at common law but under the modern statutes.

It is obvious that the main purpose of the editor in compiling these "readings" was to place in the hands of his students the material necessary for a thorough understanding of the law of Real Property. However well equipped a law school library may be, it is hardly possible for all the members of a class to get access to classroom references while the discussion is still fresh—a difficulty which this book seems mainly devised to meet.

The value of the book, however, suggests its limitations. By reason of its very purpose, it lacks entirely the connected narrative form. No book of excerpts could be expected to have continuity. For this reason it is feared that the student who attempts to use it without the aid of either a text book or an instructor will have difficulty in making headway. It is very doubtful if the book will even temporarily satisfy the demand for that modern work on Real Property which the editor in his preface recognizes as the great need of the legal profession.

The book, considering its size, contains a remarkably full presentation of modern statutes, especially from New York. The binding and printing of the book are of the best, and the value of the collection is greatly helped by a very full and carefully arranged index.

**ABBOTT'S TRIAL EVIDENCE.**—Second Edition. By John C. Crawford. New York: Baker, Voorhis & Co. 1900. Pp. xxxvi, 1190.

The original work, published in 1880, is too well known to require extended comment. In it Mr. Abbott succeeded in giving to the profession a practical working compendium of the rules relating to the modes of proof in the principal classes of actions and defences. The method of treatment adopted, namely, the division of the subject into as many classes as there are classes of action, was not scientific, and the discussions in the text dealt with rules rather than principles; consequently the book was not well adapted to the needs of students. The practitioner, however, who wishes the rules of evidence applicable to the case in hand

found them there stated clearly and concisely, so far as settled by authority, and the authorities given in well-chosen notes. As to the unsettled points of law, the author had no theories to advance. Particular attention was devoted to the forms and methods of procedure under the New York Code of Civil Procedure, and the work proved to be especially valuable to the members of the bar in the several code States.

The reviser's efforts have been mainly devoted to bringing the work down to date by collecting and accumulating the cases relating to the subject decided since 1880. He leaves the arrangement of the work undisturbed and makes few changes in the text. He does not avail himself of the opportunity afforded to expand the work by treating more fully of the rules of evidence in the various forms of equitable actions, with which the first edition dealt somewhat meagerly. Changes or developments in the law of the subject are for the most part pointed out by foot-notes.

In covering so extensive a field it would perhaps be impracticable to cite all the cases decided or examined, although such a collection of cases would be of undoubted assistance in preparing for trial or in brief-making, in connection with which the chief usefulness of the book is to be found. The reviser has accordingly limited himself to citing cases in which new points have been decided, and the recent cases in which settled rules have been applied or affirmed. In many instances he has substituted recent authorities for those originally cited in the first edition. This process of selection and substitution is one requiring much discrimination. Recent cases are always valuable, particularly to the brief-makers; but when the citation of such cases involves the dropping of earlier leading cases, the value of the work is sacrificed to the desire to save space.

On the whole, however, Mr. Crawford seems to have performed in a very satisfactory manner the somewhat thankless task of reviving the usefulness of one of our standard valuable law works. The result is a book which will prove a valuable office assistant to the busy practitioner and prove of occasional assistance to the student who is in search of authorities.

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The receipt of the following books is acknowledged and reviews will follow:

**AMERICAN LAW.** A Treatise on the Jurisprudence Constitution, and Laws of the United States. By James De Witt Andrews. Chicago: Callaghan & Co. 1900. pp. lxii, 1245.

**THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW.** By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

**OWEN'S LAW QUIZZER.** By Wilber A. Owen, LL. M. Second Edition. St. Paul: West Publishing Co. 1900. pp. v, 613.

**ELEMENTS OF JURISPRUDENCE.** By Thomas Erskine Holland, D. C. L. Ninth Edition. New York: Oxford University Press, American Branch. 1900. pp. xvi, 430.

CLERK'S ASSISTANT. By Austin Abbott, LL. D. Revised Edition. By Clarence F. Birdseye. New York. Baker, Voorhis & Co. 1900. pp. x, 1091.

PROBATE REPORTS ANNOTATED, VOL. IV. New York: Baker, Voorhis & Co. 1900. pp. xxxiii, 767.

LAW OF WILLS. Third Edition. By James Schouler. Boston: Boston Book Co. 1900. pp. lxvi, 762.

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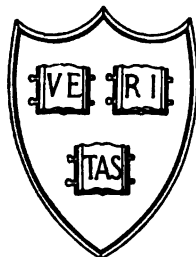
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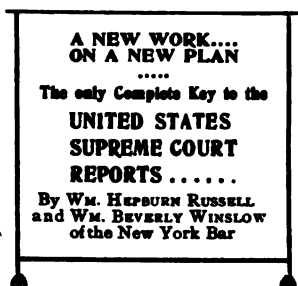
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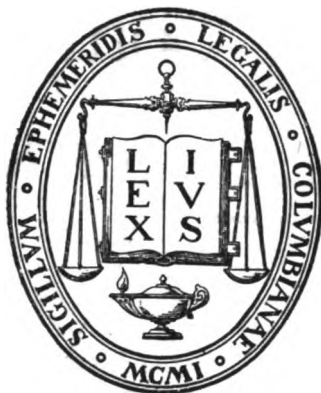
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No. 2.

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## CONDITIONS AND WARRANTIES IN THE SALE OF GOODS.

A DISTINGUISHED editor of Benjamin on Sales, at the beginning of a learned note to the chapter on Conditions, remarks: "This is not the most satisfactory chapter in Mr. Benjamin's excellent work, partly from the fact that he had already discussed one class of conditional sales in Book II, Chapter 3; partly because many incidents of a sale, which are called 'conditions' in England, are in this country generally considered as implied warranties, and their more appropriate place for the American reader is in the following chapter on Warranty; and, not a little, because, to use his own words, of the 'very subtle and perplexing nature' of the subject itself, leading one to discuss here what might with propriety be considered elsewhere." At the close of this note, the distinguished editor informs his readers that the latter part of the chapter on conditions dealing with sales by "description, etc., will be considered under the next head of Implied Warranty, where the American courts generally place it."<sup>1</sup>

On the other hand, the latest English editors of Benjamin on Sales commend the author for his clear exposition of the distinction between Condition and Warranty in the chapter above referred to, while they criticise him for devoting the greater part of the chapter on Warranty to

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<sup>1</sup> Benjamin on Sales, Bennett's, 7th Ed., 594, 608.

those engagements of the seller, which he styles Implied Warranties, but which "are essentially conditions."<sup>1</sup>

It is not strange that Mr. Benjamin failed to adhere consistently to his distinction between conditions and warranties; nor is it surprising that different critics should ascribe his failure to different causes. In the first place, it should be borne in mind that his separation of implied conditions from implied warranties was something of a novelty. With the exception of Mr. Blackburn, every writer on the law of sales had dealt with both of these classes of engagements on the part of the seller, under the head of Warranty<sup>2</sup>; and Mr. Blackburn, while treating many of them as conditions, did not discuss the topic of warranty at all. In the next place, it should be remembered, that not only was the language of judges upon this subject most confusing, but the judicial decisions were very discordant. Even as great a lawyer as Chief Justice Gibson had declared<sup>3</sup>: "On no subject have the decisions been so anomalous as on the warranty of chattels, and an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless, if not absurd." Mr. Benjamin attempted indeed to classify, distinguish and harmonize the decisions, but he did not undertake to state the law as it ought to be; he professed only to state it as he found it declared by the courts.

That the confusion and inconsistencies in his chapters on Condition and Warranty are chargeable rather to the deliverances of the courts than to him receives further confirmation from the original draft of the English Sale of Goods Act. This bill, drawn by Judge Chalmers (the draftsman of the Bills of Exchange Act), after consultation with Lord Herschell, Lord Bramwell and other distinguished lawyers, was an attempt "to reproduce as exactly as possible the statutory and common law rules relating to the sale of goods,"<sup>4</sup> A comparison of the sections of the bill under the heading of "Conditions and Warranties," Sections 11 to 18, inclusive, with Sections 10 to 15, inclusive,

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<sup>1</sup> Benjamin on Sales, Bennett's 7th Ed., 644, note (s).

<sup>2</sup> See Long on Sales, and Story on Sales.

<sup>3</sup> *McFarland v. Newman*, 9 Watts, 55 (1839).

<sup>4</sup> Chalmers' Sale of Goods, 1st Ed., Introduction.



of the Act, will show how badly confused by the cases were the learned draftsman and his counsellors. After wrestling with the subject for five years, Parliament was able to bring a considerable degree of order out of confusion and to declare with authority what engagements on the part of the seller are conditions and what engagements are warranties.

#### DISTINCTION BETWEEN WARRANTY AND CONDITION.

The Sale of Goods Act defines warranty as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."<sup>1</sup>

Condition is not specifically defined in the statute, but it is frequently contrasted with warranty as denoting every stipulation in a contract of sale, the breach of which may give rise to a right to treat the contract as repudiated. The statute also declares that "a stipulation may be a condition though called a warranty in a contract,"<sup>2</sup> and it applies the term "implied condition" to most of those engagements of the seller which judges and writers had been accustomed to call "implied warranties."

By confining the term warranty to the narrow but legitimate signification above set forth, the Sale of Goods Act has removed one of the most fruitful sources of confusion in this branch of the law. Prior to this enactment, a learned English writer,<sup>3</sup> after warning his readers "that the word warranty is used in a great variety of senses," declared that "it would be a work of some research to enumerate the various senses in which the word warranty is used," and then proceeded to recount six distinct significations which were commonly attached to it. "'Tis a consummation devoutly to be wished" that the word should be lim-

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<sup>1</sup> The Sale of Goods Act, 1893, Section 62. This provision applies only to England and Ireland. The statute declares that "As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

<sup>2</sup> *Ibid*, Section 11.

<sup>3</sup> Anson on Contracts (3d Ed.), 297.

ited in this country, as it has been limited in England, to a single signification; but it is a consummation probably attainable only by legislation. And yet it would seem to be the duty of every writer or judge dealing with this subject, to use the word in its narrow and legitimate sense and in that sense only.

#### THE FALLACY OF EQUIVOCATION.

An excellent example of the confusion resulting from the variant significations of warranty is afforded by two cases in Massachusetts. In the earlier case,<sup>1</sup> the defendant asked the plaintiff if he wished to purchase some cloves, exhibiting at the same time a sample which plaintiff examined. Finding the sample to be of the best quality of Cayenne cloves, he gave an order to defendant for two casks, and, upon their delivery, paid the agreed price. Plaintiff did not open the casks nor inspect their contents at the time of delivery, but when he did open them some months later, discovering that the cloves did not correspond with the sample, but consisted of a mixture of Cayenne cloves and an inferior and distinct species, he offered to return them to defendant, who refused to take them back, whereupon the plaintiff sued to recover the difference in value between two casks of Cayenne cloves of the best quality and the cloves actually delivered. Upon the trial, the jury found that there was no fraud on the part of defendant, but that the cloves delivered were different in kind from those which composed the sample, and inferior in value; not because of decay or exposure, but because of the specific difference in the respective stocks from which the two kinds are produced; and returned a verdict for the plaintiff. The defendant's motion for a new trial having been argued with great ability by his counsel, afterwards Chief Justice Shaw, the case was carefully considered by the Supreme Judicial Court.

Chief Justice Parker, delivering the opinion, in which his associates concurred, stated the principal question to be: "Whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered." After referring to the contention of defendant's

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<sup>1</sup> *Bradford v. Manly*, 13 Mass., 139 (1816).

counsel, "that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained, unless there be a false affirmation respecting the quality of the article," and declaring that "if such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold"; the learned Judge proceeded to consider at length the nature of a sale by sample. His conclusion was, that the exhibition of a sample by a seller "certainly means as much as this, 'The thing I offer to sell is of the same kind, and essentially of the same quality as the specimen I give you'"; and, in case the offer is accepted, the seller undertakes to supply an article which "is generically and specifically the same as the sample, and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him."

In other words, when a man contracts to sell goods by sample, he engages to deliver goods which are generically and specifically like the sample. This engagement is not collateral to the sale contract, but is one of its essential terms. If the seller fails to perform it, he fails to perform the contract, and the buyer has the right to reject the tendered goods and treat the contract as repudiated. In the nomenclature of the Sale of Goods Act, such an engagement is a condition, not a warranty.

Had Chief Justice Parker, in the case under consideration, described the seller's engagement as a condition, and then proceeded to discuss the rights of the buyer upon the seller's refusal to take back the cloves, his opinion would have been beyond criticism. After the seller declined the buyer's offer to return the cloves, and the buyer continued to retain them, the latter was at liberty to treat the breach of condition as a breach of warranty, and bring the action he did bring for damages. In the language of the Sale of Goods Act, "When a contract of sale is subject to any condition to be fulfilled by the seller, the buyer \* \* \* may elect to treat the breach of such condition as a breach of warranty," and "may maintain an action against the seller for damages for the breach of warranty."<sup>1</sup> Unfortunately,

<sup>1</sup> Sale of Goods Act, Sections 11 and 53.

however, the learned Judge, instead of supporting the plaintiff's action on this ground, and of pointing out that the defendant's engagement, that the cloves to be delivered should conform to the sample, was no longer available to the plaintiff as a condition, because he had accepted those which were delivered, thought it necessary to demonstrate that the defendant's exhibition of the sample, although "a silent symbolical warranty," was, nevertheless, "tantamount to an express warranty." It is true he repudiated the proposition laid down by defendant's counsel that "a mere representation, without technical words importing a promise or stipulation, does not constitute a warranty;"<sup>1</sup> but he appears to have thought that the plaintiff could not recover without showing an engagement on the part of the defendant, which, from the outset, was either an express or an implied warranty.

This failure to give to the seller's engagement, upon a sale by sample, its proper appellation, did not work injury to the buyer in the case we have been considering, for the reason pointed out in the preceding paragraph; but the improper designation of that engagement as a warranty appears to have confused as eminent a lawyer as Justice Metcalf, and thus to have contributed, to some extent at least, to the anomalous decision in *Bryant v. Isburgh*,<sup>2</sup> the later of the two Massachusetts cases above referred to.

In this case, the plaintiff having sued for the price of a horse sold and delivered, the defendant answered that the plaintiff upon the sale expressly warranted the horse sound; that he proved unsound and defendant returned him to plaintiff, but plaintiff refused to receive the horse back. The trial judge charged the jury that the defendant had no right to return the horse and rescind the contract in the absence of fraud, unless that right were given by the terms of the contract; but that if they found there was a warranty and a breach, they should then determine how much less the horse was worth by reason of the unsoundness, and deduct the sum so determined from the contract price, and return a verdict only for the balance. A verdict was returned for the plaintiff, with a deduction from the contract

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<sup>1</sup> *Bradford v. Manly*, 13 Mass., at p. 141.

<sup>2</sup> 13 Gray (79 Mass.) 607 (1859).

price. Exception having been alleged by the defendant, the Supreme Court decided that the ruling was erroneous, and declared "there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter which he has under the former." The statement in *Bradford v. Manly*, that upon a sale by sample the seller does not perform his contract if he tenders goods which do not correspond with the sample, and consequently he is bound to take them back if they are offered him, is referred to as a dictum, at least, in favor of the view that the buyer in the case then at bar could return the horse and rescind the bargain; for, said Mr. Justice Metcalf, "in *Bradford v. Manly* it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the thing sold." In *Bryant v. Isburgh* the transaction was the bargain and sale of a specific chattel. The main purpose of the sale contract was the transfer of the general ownership of the horse from the seller to the buyer; and collateral to that was the seller's agreement that the horse was sound. In *Bradford v. Manly* the goods were not specific when the contract was made, and it was a fundamental term of that contract that the seller should supply two casks of cloves like the sample. His non-performance of this term was a breach of the contract. He was defeating the main purpose of the contract, not violating an agreement which was simply collateral to that main purpose.

Although at times "words are but wind," not infrequently they are things, and a man

"Is controlled by the words he disdains to control."

By using a word with a double meaning and failing to notice its duplicity, Mr. Justice Metcalf appears to have fallen a victim to the fallacy of equivocation.

#### VARIANT SIGNIFICATIONS OF WARRANTY IN NEW YORK.

If the indiscriminative use of warranty has contributed to the establishment of the unsound doctrine in Massachusetts that the breach of a collateral warranty upon the bargain and sale of specific goods gives the buyer the right to return them and treat the sale contract as repudiated, in

New York it is largely responsible for an equally unsound doctrine, that, upon the sale of goods by description, the buyer has not the right to retain them and claim damages if, upon their delivery, he discovers, or by ordinary inspection could discover, that they do not conform to the description.

How great is the confusion of the judicial mind in New York on the subject of warranty can be fully appreciated only after a careful comparison of the reported cases. Certainly no one can make that comparison without being impressed with the truth of Lord Coke's declaration that "the learning of warranties is one of the most curious and cunning learnings of the law." Space will not permit an extended examination of the New York decisions in the present article, but some idea of the divergent judicial views may be given by a brief digest of a few leading cases.

In *Reed v. Randall*<sup>1</sup>, "The plaintiffs agreed to pay 10 cents per pound on the delivery of a crop of tobacco growing on defendant's land, well cured and boxed and in good condition, and the defendant agreed to sell and make such delivery." This engagement as to the boxing, curing and merchantable condition of the tobacco was declared not to be a warranty; and "the rules of law by which the rights of the parties in respect to warranties are regulated" were held to be inapplicable. In *Dounce v. Dow*<sup>2</sup> the plaintiff contracted to sell and deliver to defendants 10 tons of XX pipe iron, which should be of a quality suitable and proper for use in the defendant's manufacturing business. Here, the Commission of Appeals ruled, "was an express agreement or warranty that the iron should be of that specified or designated quality," and *Reed v. Randall* was distinguished as a case decided on the theory that it involved "an executory contract, but not an express warranty." On the second trial of *Dounce v. Dow* no evidence was given of an express engagement as to quality,<sup>3</sup> and it was held, both by the Supreme Court and by the Court of Appeals that there was a warranty that the iron was "XX pipe

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<sup>1</sup> 29 N. Y., 358 (1864). The statement of the contract is taken from the prevailing opinion at pp. 360, 361.

<sup>2</sup> 57 N. Y., 16 (1874).

<sup>3</sup> 6 T. & C., 653, 656, 658 (1875).

iron." In the Court of Appeals it was said, "The only other liability which can be claimed he (the seller) incurred was of an implied warranty that the iron was merchantable, and this could not be affirmed unless the contract was executory."<sup>1</sup>

Another pair of New York cases, which it is interesting to contrast, are *Hawkins v. Pemberton*<sup>2</sup> and *Coplay Iron Co. v. Pope*<sup>3</sup>. In the former, the plaintiff sold to the defendant at auction an article, described by the auctioneer, as "blue vitriol, sound and in good order." The Court had no hesitation in holding "that there was a warranty that the article was sound and in good order," and that "a jury might properly have inferred that there was, upon the sale, a warranty that the article sold was blue vitriol." It was the opinion of the learned Judge writing the opinion that the trial Court "could, without error, have decided, as a question of law, that there was a warranty," to this effect. In the second case, the engagement of the plaintiff, to sell to defendant "900 tons of No. 1 extra foundry pig-iron of the Coplay Iron Company make," was held not a warranty, although the plaintiff admitted that the "No. 1 extra was a grade of pig iron of certain well-known quality in the market." With the declarations in these two cases should be collated the statement of Judge Learned,<sup>4</sup> quoted with approval by the present Chief Judge of the Court of Appeals<sup>5</sup>: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter."

Another set of cases, affording an interesting comparison, consists of *Day v. Pool*<sup>6</sup> and *Gurney v. Atlantic, etc., Co.*,<sup>7</sup> on the one hand, and *Gaylord Manufacturing Co. v.*

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<sup>1</sup> 64 N. Y., 411 (1876).

<sup>2</sup> 51 N. Y., 198 (1872).

<sup>3</sup> 108 N. Y., 232; 15 N. E., 335 (1888).

<sup>4</sup> *Kent v. Friedman*, 17 Weekly Dig., 484; *affd.*, 101 N. Y., 616 (1885).

<sup>5</sup> *Fairbank Canning Co. v. Metzger*, 118 N. Y., 260; 23 N. E., 372 (1890).

<sup>6</sup> 52 N. Y., 416 (1872).

<sup>7</sup> 58 N. Y., 358 (1874).

Allen<sup>1</sup> on the other. In *Day v. Pool*, the engagement of the seller to supply defendant with 80 barrels of rock-candy syrup "that would not crystallize, or the sugar fall down in its use," was construed as a warranty that the syrup should possess such characteristics; and in the *Gurney* case a similar construction was put upon a contract to manufacture and deliver a quantity of steel frogs, to correspond in all respects with a sample furnished the seller. On the other hand, in *Gaylord Manufacturing Co. v. Allen*, it was held that a contract to sell malleable iron castings "to be of the best quality and suitable to the purpose designed" did not contain a warranty. The difficulty experienced in reconciling these cases is increased rather than diminished by the following deliberate statement in the carefully considered opinion in *White v. Miller*:<sup>2</sup> "The case of *Hawkins v. Pemberton*, 51 N. Y., 198, adopts, as the law of this State, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified. We think the modern doctrine upon the subject reasonable, and proceeds upon a just interpretation of the contract of sale. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described; and this constitutes a warranty."

The following statements, it is believed, are justified by the foregoing cases and others of a similar character in New York. As a rule the term warranty is not confined to its narrow and legitimate sense, although it is thus limited in some of the decisions.<sup>3</sup> On the other hand, it is not so extended as to include all of those engagements of the seller, which are styled "implied conditions" in the English statute, but which are denominated "implied warranties" in many jurisdictions. Whether it shall be applied to an engagement of that sort (for example, the vendor's engage-

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<sup>1</sup> 53 N. Y., 515 (1873).

<sup>2</sup> 71 N. Y., 118, 129 (1877).

<sup>3</sup> *Gaylord Manufacturing Co. v. Allen*, 53 N. Y. 515 (1873); *Coplay Iron Co. v. Pope*, 108 N. Y., 232 (1888) are examples.



ment in a sale by description), is made to depend, not upon the vital or the collateral character of the engagement, but upon the question, can the purchaser discover by an ordinary inspection, when the article is delivered, that it does not conform to the contract.<sup>1</sup> Or to put it in another way—the term warranty is applied to every engagement of the seller as to the character or quality of the subject-matter of the sale contract, which is not a mere condition. It embraces, therefore, not only the collateral agreement of warranty which may attend a bargain and sale, but every promise of a vendor, in a contract to sell, whether express or implied, which the purchaser is justified in believing the vendor intended should survive the acceptance of the delivered article.

Accordingly, a breach of warranty in New York may give rise to a claim to reject the goods and treat the contract as repudiated, or it may give rise only to a claim for damages. Whether it gives rise to the one or to the other claim depends upon whether the sale transaction is executory or is executed. In the language of a carefully considered case: "If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and when there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent, and, when offered, the vendor may reject the goods as not answering the bargain, but if the sale was with warranty he may receive the goods and then the same consequences attach as in the former case, and among others, the right to compensation if the warranty is broken."<sup>2</sup>

#### CAVEAT EMPTOR AND WARRANTY IN NEW YORK.

- That this peculiar usage of the term warranty has caused unnecessary confusion and perplexity in the law of sales in New York cannot be successfully denied. How is the pecu-

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<sup>1</sup> *Van Wyck v. Allen*, 69 N. Y., 61 (1877).

<sup>2</sup> *Brigg v. Hilton*, 99 N. Y., 517, 529 (1885).

liarity to be accounted for? Apparently it is due in large measure to the spasmodic efforts of certain eminent Judges to stem the tide of encroachments upon the doctrine of *caveat emptor*, and to maintain the rule of primitive law that "the purchaser buys at his peril," unless he can show "an express warranty or some fraud on the part of the vendor." Let us trace rapidly the course of judicial decision on this topic.

*Seixas v. Woods*<sup>1</sup> is the first case in order of time. Defendant sold to plaintiff wood which had been sent to the former as *brazillette*, and which he had advertised by that name, and which both parties supposed to be *brazillette*, but which was, in truth, *peachum*, a wood of a different species and almost valueless. Upon discovering the real character of the article, plaintiff offered it to the defendant and demanded the purchase-money. Defendant refused to receive the property or to repay the price, and plaintiff brought "an action on the case for selling *peachum* wood for *brazillette*." Judgment was given for the defendant on the ground that the description of the article did not amount to a warranty that it was *brazillette*, and that "the maxim of *caveat emptor* must be applied."

Later came *Swett v. Colgate*,<sup>2</sup> where an article was described in the contract as *barilla*, but which was in fact kelp, "a substance so closely resembling *barilla* that it could not be distinguished from it except by analysis," yet greatly inferior to it in value. *Seixas v. Wood* was followed and judgment given for the seller, because "By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss: the rule is *caveat emptor*."

The plaintiff, in *Oneida Manufacturing Co. v. Lawrence*,<sup>3</sup> having bought by sample a quantity of cotton in bales, and the bulk having turned out to be far inferior to the sample, brought an action for breach of warranty. Defendant relied largely upon *Seixas v. Woods* and *Swett v. Colgate*, but the Court thought the case was not controlled by those

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<sup>1</sup> 2 Caines, 48, 52, 53, 54 (1804).

<sup>2</sup> 20 Johns., 196, 202 (1822).

<sup>3</sup> 4 Cowen, 440 (1825).

decisions, and sustained a verdict for plaintiff on the ground that "in cases of sales by sample, the vendor is held responsible that the quality of the bulk of the commodity shall be equal to the sample shown." The disposition evinced by Chief Justice Savage, in the last cited case, to trench upon the doctrine of *caveat emptor*, was shared by Mr. Justice Nelson in *Gallagher v. Waring*,<sup>1</sup> also an action growing out of a sale of cotton by sample. He said: "A sale by sample implies a warranty that the bulk corresponds with the sample. Every sale implies a warranty of the title to the article; and when the vendee has no opportunity of examining the article, the sale implies that the article delivered is of the kind and species of that which was contracted for, and is of good merchantable quality and condition; as then the maxim *caveat emptor* cannot apply. These principles are fully supported by authority, and inculcate in commercial dealings sound maxims of morality, from which no honest man can claim an exemption."

On appeal, Mr. Justice Nelson's views were not fully approved by the Court of Errors.<sup>2</sup> The judgment was affirmed by a divided court, but Chancellor Walworth, who wrote the prevailing opinion, was careful to place the decision on the ground that "every agreement to sell by sample does, from its very nature, contain an implied, if not an express, warranty, that the bulk of the article sold corresponds with such sample"; and to reject the doctrine of an implied warranty of merchantableness. Senator Paige, speaking for the minority, argued at length for the repudiation of all implied warranties. The tendency to a strict enforcement of the rule of *caveat emptor* displayed on this appeal, was shown in another case decided at the same Term. In *Wright v. Hart*,<sup>3</sup> the trial Judge instructed the jury that if the flour sold by defendant to plaintiff was defective and unfit for the ordinary purposes for which flour is used, the plaintiff was entitled to recover. This ruling was held erroneous, both by the Supreme Court and the Court of Errors, and the doctrine was announced that "in

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<sup>1</sup> 9 Wend., 20, 27 (1832).

<sup>2</sup> *Waring v. Mason*, 18 Wend., 425 (1837).

<sup>3</sup> 18 Wend., 449 (1837).

a general sale of merchandise for a sound price, where there is no express warranty or fraud, an action will not lie against the vendor on an implied warranty that the article is merchantable." The opinion of Mr. Justice Cowen<sup>1</sup> and of Senator Tracy<sup>2</sup> are spirited if not vehement defenses of the maxim of *caveat emptor*. They were thought by Chancellor Kent to have reinstated the common law doctrine upon this point in the jurisprudence of New York.<sup>3</sup>

For a time it looked as though they had accomplished that result. In *Hargous v. Stone*,<sup>4</sup> Judge Paige (the Senator Paige, of *Waring v. Mason*, *supra*), delivering the unanimous opinion of the Court of Appeals, declared that the only inroad which the courts of New York had made upon the common law rule of *caveat emptor*, was in sales by samples; and "this exception," he said, "rested upon no principle," and had been applied only to "sales of cotton packed in bales." He championed the common law rule with great earnestness and enthusiasm, characterizing it as a "most just and convenient rule," and, insisting that "if the purchaser does not wish to run the risk of latent defects, he must provide himself an indemnity against such defects, by exacting an express warranty from the vendor when such warranty is required," he added, "the vendor will be at liberty to decide for himself whether he will enter into a contract of warranty or not."

However, a reaction from this rigid adherence to the rule of *caveat emptor* soon set in, as is attested by the opinion of Judge Selden in *Hoe v. Sanborn*.<sup>5</sup> Here the buyer as a defense to an action for the price of certain saws, alleged plaintiffs' breach of warranty that the saws were "good saws and of good quality." No express warranty was shown, but the Court of Appeals decided "that a manufacturer who sells goods of his own manufacture impliedly warrants that they are free from any latent defect growing out of the process of manufacture." Judge Selden

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<sup>1</sup> *Hart v. Wright*, 17 Wend., 267 (1837).

<sup>2</sup> *Wright v. Hart*, 18 Wend., 458-465 (1837).

<sup>3</sup> 2 Kent's Comm., 479, note (c).

<sup>4</sup> 5 N. Y., 73, 84, 89, 90 (1851).

<sup>5</sup> 21 N. Y., 552 (1860).

referred to the disposition of many New York judges to reject all exceptions to the maxim *caveat emptor*, but declared that "if honesty and fair dealing are ever to be enforced by law, a warranty should be implied," in such a case as was then before the Court. He also expressed the opinion that "implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud."<sup>1</sup>

A few years later the Court of Appeals unhesitatingly declared that in an executory agreement to sell and deliver corn there was an implied warranty that the corn should be of a merchantable quality.<sup>2</sup> During the progress of this reaction the cases of *Seixas v. Woods* and *Swett v. Colgate*, after having been criticised in other jurisdictions and but lamely defended by Chancellor Kent<sup>3</sup> were thoroughly discredited in *Hawkins v. Pemberton*<sup>4</sup>; and, in *White v. Miller* <sup>5</sup>, were treated as virtually overruled.<sup>6</sup>

#### BREACH OF CONDITION NOT CONVERTIBLE INTO BREACH OF WARRANTY.

Meanwhile, however, the partisans of *caveat emptor* had rallied and committed the Court of Appeals to a position, which has blocked the development of this branch of the law along the natural lines which have characterized its progress in England, and in many of our jurisdictions.

<sup>1</sup> In *Randall v. Newson*, 2 Q. B. D., 102 (1877), Brett, J. A., announced a different and better view, viz.: "The governing principle" (in implied warranties, now called conditions by the English Sale of Goods Act) "is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out."

<sup>2</sup> *Hamilton v. Gaynard*, 2 Abb. App., Dec., 314 (1866).

<sup>3</sup> 2 Kent's Comm., 479.

<sup>4</sup> 51 N. Y., 198 (1872).

<sup>5</sup> 71 N. Y., 118 (1877).

<sup>6</sup> After these declarations of the Court of Appeals it is not a little surprising to find *Seixas v. Woods* cited for the proposition, "that when there is neither express warranty nor fraudulent representation as to quality or goodness of an article sold, the vendor is not bound to answer except under special circumstances, and that the rule of *caveat emptor* applies;" as was done in *Ives v. Ellis*, 50 App. Div., 399 (1900).

In *Reed v. Randall*,<sup>1</sup> referred to on a former page, the Court decided that one who agreed to buy a crop of tobacco, thereafter to be well cured, boxed and delivered in good condition, had a right to reject the tobacco when tendered if it did not conform to the contract; but if he received and retained it after an opportunity to ascertain its defects, he thereby waived all remedy for the vendor's breach of his contract. Prior decisions compelled the Court to admit that upon an agreement to sell goods, there is an implied warranty that they are merchantable; but its dislike of implied warranties and its desire to limit their effects as narrowly as possible, led it to the conclusion that the vendor's engagement as to merchantableness is not a true warranty and is never available as such to the vendee; that it does not amount to a covenant for indemnity; but that it is a term of the sale contract, and a term which is available to the vendee only as a condition. In support of this view, the principal American authority cited is *Hargous v. Stone*,<sup>2</sup> while the English authorities are four *nisi prius* cases,<sup>3</sup> some of which have been overruled, and none of which are now treated in England as warranting the proposition above set forth. Judge Hogeboom wrote a vigorous dissenting opinion, and other judges<sup>4</sup> have doubted the wisdom of the decision; but, with a modification to be mentioned presently, it remains law in New York.<sup>5</sup>

The doctrine of *Reed v. Randall* never obtained in England. It was contended for by the defendant in *Yeats v. Pim*<sup>6</sup> but was repudiated by the Court, consisting of Lord Chief Justice Gibbs and Justices Dallas and Park. The plaintiffs in that case contracted for "fifty bales Purvise's prime singed bacon"; and that quantity was delivered and retained by them. After nearly two months

<sup>1</sup> 29 N. Y., 358 (1864).

<sup>2</sup> 5 N. Y., 73 (1851).

<sup>3</sup> *Grimaldi v. White*, 4 Esp., 95 (1802); *Fisher v. Samuder*, 1 Camp., 190 (1808); *Hopkins v. Appleby*, 1 Stark, 477 (1816); *Milnor v. Tucker*, 1 Car. & P., 15 (1823).

<sup>4</sup> *Woodruff v. Peterson*, 51 Barb., 255, 256 (1868); *Harris v. Rathbun*, 2 Keyes, 312, 315 (1866).

<sup>5</sup> *Coplay Iron Co. v. Pope*, 108 N. Y., 232 (1888); *Mack v. Swett*, 140 N. Y., 193 (1893).

<sup>6</sup> 2 Marshall, 141 (1816).

they gave notice to the sellers that the bacon did not answer the contract, and, having paid the price, sued for damages for breach of warranty. It was held that the retention of the goods and the failure to give prompt notice of the defect did not prevent a recovery. The delay in notifying the sellers was of importance only as evidence bearing on the question, whether the defect existed when the goods were delivered.

A similar ruling was made in *Freeman v. Baker*,<sup>1</sup> where a ship, advertised by defendant as copper fastened, was bought, paid for and received by plaintiff. He did not examine the ship before making the contract, but did on the following day and then discovered that she was not copper fastened, yet he did not reject the vessel; nor did he make any complaint for several months, and later sued for damages. At the trial, defendant's counsel contended that "plaintiff should have notified his objection sooner" and "the foreman of the jury inquired whether it would make any difference as to the verdict if the jury should think that the ship was not copper fastened, but that the plaintiff ought to have made his objection sooner." Chief Justice Denman answered: "I do not think that it will make any difference; it would have been much better if notice had been immediately given. But I think the plaintiff was not bound to give it. I think a man may complete the contract, and then recover from the seller any difference in the value, if he has been deceived. I think so for this reason, viz., that a man may want a vessel for his immediate purposes, and it may be inconvenient to him to give it up at the time."

This view of the Chief Justice has been uniformly approved by the English courts and is now embodied in the Sale of Goods Act.<sup>2</sup> It is accepted in many American jurisdictions.<sup>3</sup>

<sup>1</sup> 5 C. & P., 475, 483 (1833). At the trial and on the discussion of a rule *nisi*, the Chief Justice was of the opinion that, as the contract of sale was reduced to writing, and this statement as to copper fastening was not incorporated therein, it was not a term of the sale contract. Consequently the plaintiff was nonsuited.

<sup>2</sup> Sections 11 and 53.

<sup>3</sup> *Underwood v. Wolf*, 131 Ill., 425 (1890); *Northwestern Cordage Co. v. Rice*, 5 N. D., 432; 67 N. W., 298 (1896); *Morse v. Moore*, 83 Me., 471; 22 Atl., 362 (1891).

The modification of *Reed v. Randall*, referred to above, was made by a divided court in *Day v. Pool*,<sup>1</sup> and recognized by Chief Judge Church in *Gurney v. Atlantic, etc., Co.*,<sup>2</sup> to this effect. When the seller is bound to deliver goods of a particular quality, although the obligation does not take the form of a collateral warranty, but results from the terms of the sale contract (as in the case of a sale by description), yet, if the defect in the goods is of such a character as not to be discoverable upon the usual and ordinary inspection at the time of delivery, the buyer is not bound, upon a subsequent discovery of the defect, to return the goods or notify the seller. His continued retention and use of them will not amount to a waiver and acceptance; but he may recover damages, "relying upon the so-called warranty." It is difficult to answer Chief Justice Church's question, why should the time or mode of examination make any difference in the duty of the buyer to return the goods? If he is bound to return them in a case where he discovers the defect at the time of delivery, why should he not be bound to return them promptly upon discovering their defect at a later day?

However, while the modification of *Reed v. Randall* may be illogical, it does afford the buyer some relief from the harsh consequences of that decision. How unfairly even the modified doctrine affects the purchaser is apparent from *Coplay Iron Co. v. Pope*.<sup>3</sup> The defendants, iron brokers in New York, accepted an order from E. P. Allis & Co. of Milwaukee, Wis., for 500 tons of No. 1 extra foundry pig iron of the Coplay Iron Company's manufacture, to be delivered at the furnace of the iron company at Coplay, Pa. They, in turn, ordered the iron from the company, and directed it to be shipped to Allis & Co. Defendants did not examine it before shipment, but when it reached Milwaukee Allis & Co. rejected it on the ground that it was not No. 1 extra foundry pig-iron, but iron of a quality greatly inferior thereto. Defendants informed plaintiff at once of the claim made by Allis & Co., requested it to ex-

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<sup>1</sup> 52 N. Y., 416 (1873).

<sup>2</sup> 58 N. Y., 358, 365 (1874); the Chief Judge dissented in *Day v. Pool*, on the grounds set forth in *Gurney v. Atlantic, etc., Co.*, *supra*.

<sup>3</sup> *Coplay Iron Co. v. Pope*, 108 N. Y., 232 (1888).



amine the iron, and notified it that they would hold it liable for all damages they might sustain by reason of the iron not being of the kind ordered. Allis & Co. having paid the Popes for the iron before delivery, and having rejected it when tendered, sued them for the price and recovered on the ground that the iron furnished was not of the grade ordered.<sup>1</sup> The Popes were also sued by the Coplay Iron Company for the price of the iron. In this suit they alleged and proved the facts above set forth, and asked to counterclaim their damages against the plaintiff's cause of action. They were again beaten. "Here," said the Court of Appeals "there was no collateral warranty or agreement as to the quality of the iron. The representation as to the kind and quality of iron was part of the contract of sale itself, descriptive simply of the article to be delivered in the future; and \* \* \* an acceptance of the property by the defendants, without any offer to return the same at any time, deprives them of any right to make complaint of its inferior quality."

WHETHER A STIPULATION IS A CONDITION OR A WARRANTY.

While the English decisions and Sale of Goods Act protect the buyer from being victimized as in the Coplay Iron Company case; and while they simplify the legal rules, as well as promote justice between seller and buyer, they do not remove all difficulty from this branch of the law. A recent English case<sup>2</sup> is quite in point. Plaintiff sued for the purchase-price of a machine. The defense was that plaintiff offered to sell a "self-binder" to the defendant, which the latter had never seen, and which plaintiff described as practically new, having been used but one season, and having cut 50 to 60 acres only. Upon delivery defendant discovered it was not practically new, having been used more than one season, and having been mended. He notified plaintiff that it did not conform to the contract, and, after about six weeks, returned it. The trial Judge ruled that it was a sale by description, but as the buyer had kept

<sup>1</sup> Pope v. Allis, 115 U. S., 363 (1885).

<sup>2</sup> Varley v. Whipp (1900), 1 Q. B., 513; 69 L. J. Q. B., 333.

the machine an unreasonable time, he could only treat the statement concerning the character of the machine as a collateral warranty, and not as a condition entitling him to rescind. On appeal, however, it was held that the words describing the machine were a condition and not a collateral warranty, and that defendant's delay in sending back the machine did not convert the condition into a warranty. Mr. Justice Channell, after remarking that "the case turns upon a rather fine point, namely, whether certain words used by the seller were part of the description or merely constituted a collateral warranty," illustrated the difference between a condition and a warranty as follows: "If a person says, 'I will sell you my four-year-old in the last stall,' and there is no four-year-old, but a horse of a different age," the property in the horse would not pass, unless the purchaser waives the condition that the horse tendered shall correspond with the description and accepts him. "If he had said, 'I will sell you a four-year-old horse in my M stall, and he is sound,' the latter part of the statement would be a collateral warranty."

The difficulty at present in England is not in apprehending the legal distinction between a condition and a warranty, but in applying that distinction to the construction of particular contracts—a difficulty of meager proportions in comparison with that which besets the New York lawyer when called upon to advise his client whether a given stipulation in a sale contract is a warranty, or may become available as a warranty.

#### CAVEAT EMPTOR *vs.* CAVEAT VENDITOR.

In *Seixas v. Woods*,<sup>1</sup> Mr. Justice Kent, after contrasting the maxim of *caveat emptor* with that of *caveat venditor*, declared: "If the question was *res integra* in our law, I confess I should be overcome by the reasoning of the civilians. And yet," he added, "the rule of the common law has been well and elegantly vindicated by Fonblanque, as most happily reconciling the claims of convenience with the duties of good faith." His latest opinion upon the subject, however, appears to have been unreservedly in favor

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<sup>1</sup> 2 Caines, 48, 55, (1804).

of the wisdom and soundness of Fonblanque's view, and in opposition to that of the civilians, which had commended itself to him in early life. To quote his own words: "I cannot but think that the old rule, and the old decisions, down to that of *Seixas v. Woods*, were the safest and wisest guides; and that the new doctrine" of "implied warranty" of merchantableness and of fitness for use, "will lead to much difficulty and vexatious litigation in mercantile business."<sup>1</sup>

This theory that the rule of *caveat emptor* tends to restrain litigation has been championed with great earnestness, both in this country<sup>2</sup> and in England;<sup>3</sup> and yet, on both sides of the Atlantic, "the distinct tendency of modern cases" and of modern legislation "is to limit its scope."<sup>4</sup> That tendency will continue undoubtedly, for it is in accordance with the demands of a commercial age.

It is true that an eminent and learned judge has declared, "The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and, in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country: while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade."<sup>5</sup> But a statement could not well be more inaccurate.

The early rule of the civil law "in effect, was *caveat emptor*."<sup>6</sup> Unless the seller was guilty of fraud or the buyer had protected himself by express stipulation,<sup>7</sup> the latter had no remedy for defects in the goods sold. With the growth of commerce in the Roman world, not only the

<sup>1</sup> 2 Kent's Commentaries, 479, note (c).

<sup>2</sup> *Hart v. Wright*, 17 Wend., 267, 273 (1837); S. C. on Appeal, 18 Wend., 449, 463 (1837).

<sup>3</sup> Mercantile Law Commission, 1855, 2d Report, p. 10.

<sup>4</sup> Chalmers' Sale of Goods Act, 3d Ed., 32.

<sup>5</sup> Selden, J., in *Hoe v. Sanborn*, 21 N. Y., 552, 558 (1862).

<sup>6</sup> Moyle's Contract of Sale in the Civil Law, 191.

<sup>7</sup> The following form of stipulation is given by Varro: "That these she goats are to-day in good health and able to drink, and that one may lawfully have them—all this you undertake?"—Translated in Hunter's Roman Law, 498.

inadequacy, but the injustice, of this rule of primitive law became apparent, and it was modified by the Curule Ædile. At first the Ædilician Edict appears to have been confined to the sale of slaves in open market, but later by edict and by the construction put upon edictal law by the jurists, the doctrine of *caveat venditor* was fully established, "so that an implied warranty of freedom from defects impairing reasonable use came to be inherent in every sale of any magnitude, wherever entered into."<sup>1</sup>

The same causes which converted the rule of *caveat emptor* into that of *caveat venditor* in Roman law have been operating, during the last century, towards the same result in English law. Judges and mercantile law commissions may inveigh against the tendency as stoutly and as eloquently as they please; their efforts will prove fruitless. As well may they fight against the stars in their courses. Already the exceptions to *caveat emptor* are so numerous that the rule as formulated in Coke on Littleton<sup>2</sup> no longer exists. In the great majority of cases, the vendor of goods, even in the absence of any express undertaking on the subject, is held to engage that he is the owner of the article which he proffers for sale; or that it is of merchantable quality; or that it is fit for a particular purpose; or that it answers the description under which it is sold; or that it conforms to a sample which the purchaser has examined. A common law maxim which antedates Coke on Littleton, cannot be said to have had its origin in a commercial age. In fact *caveat emptor* is a rule of primitive law. The modern tendency in English jurisprudence to narrow its scope is not due to any disposition on the part of the bench or bar to prefer civil law doctrines to those of the common law. It is only an illustration of the truth of Sir Henry Maine's remark<sup>3</sup> that "our own jurisprudence and that of Rome ought to be studied together, not because they were *once* alike, but because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we" English-speak-

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<sup>1</sup> Moyle's Contract of Sale in the Civil Law, 194, 195.  
Co. Litt., 12a.

<sup>3</sup> Maine's Village Communities and Miscellanies, 332.

ing lawyers "are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought and to the same conceptions of legal principle to which the Roman jurists had attained after centuries of accumulated experience and unwearied cultivation."

FRANCIS M. BURDICK.

## LEGAL EDUCATION.\*

I HAVE chosen on this occasion, and in performance of the annual duty imposed upon your President, to submit to your attention some thoughts rather practical than academic, and to busy myself more with the facts which surround and compel us than with the theories which may be built upon them. The objects of this Association are very clearly stated in its Constitution thus: "To cultivate the science of Jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, and to cherish the spirit of brotherhood among the members thereof." These are all high and worthy purposes; and a study of our records will show that they have constantly been kept in view, and a genuine progress toward the ultimate and coveted result has been made. If that progress has not gone as fast and as far as one might wish, and the journey's end is still in the distance, it is worth our while to measure the obstacles which have delayed us and the effort necessary for their removal; and it is one of those obstacles which the duties of my later life have forced upon my attention to which I desire now to direct yours.

It is obvious that none of the purposes which we are organized to promote can be accomplished except by influences operating upon the members of the Bar themselves. If Jurisprudence is to be cultivated, it must be by individual lawyers contributing each his separate study to the general advance. If the law is to be reformed, it must be done mainly by those who understand the mysteries of its mechanism, or mischief rather than mending will result. If the administration of justice is to be facilitated, the Bench and the Bar must join in the needed changes and help each other to that end. If integrity and courtesy and brotherhood are to be secured to a

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\* An address delivered January 15th, 1901, before the State Bar Association by the Honorable F. M. Finch, as President, which resulted in the unanimous vote of the Association in favor of the changes suggested.

greater extent than now exists, it is through the members of the profession, guiding and shaping the activities of their own lives, that the improvement must come. It is plain, therefore, that every influence for good which it is possible for us to exert in the direction of our declared purposes must operate upon the individuals constituting the Bar, primarily and principally, or some degree of failure will bring its disappointment. So far, therefore, as our objects are unattained we must not fail to understand that it is to the lawyer himself that we must appeal ; it is the lawyer himself whom we must educate and train to be and become the man we would have him. Any effort which does not strike home to each member of the profession and operate upon his head and heart, his intelligence and morality, the trend and character of his daily life, is quite sure to prove ineffectual.

But all experience teaches us that such an effort, extending over a large body of men, and expected to operate steadily though slowly, through many years and upon changing and mobile varieties of character, has its best chance, its most hopeful opportunity, when it begins with the young men, at the threshold of their careers, and before habit or circumstance has hardened them into ways which we desire to see improved. The young men are our source of supply. They pour in annually the fresh blood of their hopes and ambitions, and as the years run on they become the Bar and make it what it is. I am sure, therefore, that the work of our Association can best attain its declared objects by striving to make that student body in head and in heart, in manners and morals, in every aim and every purpose, fully abreast of the standard of professional excellence which we have set before us.

To do this prudently we must take account of current conditions. They are widely and radically different from those existing fifty years ago when the older men among us, now peacefully counting the scars of our battles, were admitted to the Bar. Then there was no rule of preparation for the study of law and there was no instruction save that obtained in the law office. Men totally unfit registered their names as clerks, and then picked up in a way, both lazy and unsystematic, enough of Blackstone and Kent, and

enough of practice through the copying of papers to pass the very easy and timid examination of a sudden committee drafted from a reluctant bar. The saving element and the only one in the situation was that the clerk became more or less the assistant of the master, and that, through the copying of papers, precedents of pleading and of practice, forms of conveyancing, and briefs upon disputed questions of law passed under the young man's eye slowly enough to be studied with the patient progress of his pen. He absorbed what law he knew rather than studied it. It is quite true that this crude and lax method of study was paralleled by that of the Inns of Court in England which were long mere scenes of revel and festivity, and even yet do not require too much of the men upon their rolls; and that in both countries very able and distinguished lawyers grew up whose names and reputations have survived. But these were men who succeeded, not because of the prevailing system of study, but in spite of it; self-taught men who won their way by the most persistent and industrious labor, and who simply conquered their awkward surroundings. I believe, too, that their fame was largely due to the wide gap which opened between them, and the average practitioner whose low level of acquirement has been so lifted and the gap so narrowed that the same learning and capacity exhibited now has much less of the marvelous about it, and has ceased to excite the wonder out of which fame is born.

But the one good and useful element in the old system has almost wholly disappeared. In general, under existing conditions, the student in the law office copies nothing and sees nothing. The stenographer and the typewriter have monopolized what was his work. The flying symbols and click of the keys have distanced the slow travel of his pen, and he sits outside of the business tide ebbing and flowing around him like some solitary on the sands tired of the book that has grown dull. Difficulties, however, usually breed remedies, and the student's needs very soon evolved Law Schools. They have grown up with astonishing rapidity and in the main working in right directions. At first they failed to recognize fully the duty and responsibility thrust upon them. They became a sort of loafer's



paradise and a hospital for those that had failed elsewhere. The collegian dismissed for incapacity or idleness made a harbor of the law school where he could lie lazily at anchor. But this unhappy condition did not last long. Most of the Schools tightened the reins of discipline, systematized their courses of study, tested their men with rigid examinations, weeded out the idle and the vicious, and tied the classes down to lines of vigorous and faithful study. If there are any which have not emancipated themselves from the loose and lazy ways of the earlier time, they should be subjected to the influence which the massed opinion of the Bar can exert, and induced to lift themselves to the level of the best. For it is the truth of to-day, the inevitable outcome of changed conditions and surroundings, that the future of the Bar is in the hands of the Law Schools. It will rise or fall in learning and ability, in the scope and range of its intelligence, in the measure of its integrity and the tone of its morality, as the Law Schools rise or fall, for they take the young men at their most impressionable age and serve as the mould in which the melted gold of youth, bubbling and restless, is cleared of its adulterants and shaped into the cold firmness of its ultimate purpose. We must face that new condition. We must take the measure of the new duties which it imposes; and the Bar must watch the Law Schools.

I am glad to be able to say that this Association has not neglected that duty, that through its committees on legal education it has done much for the advancement of the Schools; but I think also that the general body of our profession have given little thought and less care to the one agency which most directly affects the standing and character of the Bar. They have been content to entrust their protection against an irruption of the unfit to the barrier provided by the formation of the State Board of Law Examiners. That was a wise measure, and the Board has done its work well. It has winnowed out, better than has ever been done before, the wheat from the chaff, and yet of necessity much material gets through the screen that ought to have been stopped at an earlier stage and in a different way—ought to have been stopped in the Law Schools themselves—will be stopped there when the gen-

eral sentiment of the Bar joins in a demand for higher standards of preparation and longer and more thorough courses of study.

And this brings me to some suggestions for which I alone am responsible, but which I think this Association should take into serious consideration. I believe the time has come when the court of last resort to which has been entrusted the formation of rules for admission to the Bar should amend those rules by requiring a complete High School course of four years or its equivalent as a minimum of preliminary preparation for the study of Law, and a course of three years in a Law School or of four years in a law office as the condition of examination for the Bar. These suggestions involve the inquiry whether the Court will be willing to make such a change, and whether it ought to make it. I may be permitted to say that I know a little something about that Court and its staid and careful ways. I hazard nothing in expressing the assurance that there are no members of the profession more anxious than they to see the standards of legal education elevated and the material of the Bar strengthened and improved; but they feel it to be their duty not to legislate in advance of the public and professional sentiment, and to move slowly and with care along the routes of change. They are conservative; they should be; but I believe it capable of demonstration that the suggested amendment of their rules will meet the cheerful approbation of the Bar and the public, and that the change in and of itself is desirable and prudent.

The general trend of opinion is very manifest when we recall that a majority or almost a majority of the Law Schools of the State, at the expense of both numbers and income, have already adopted the complete High School standard and the three-year course; that Columbia University has gone further by confining her law school after 1903 to college graduates; that the Association of Law Schools of the Nation formed last summer at Saratoga deliberately limited its membership to those which after September, 1901, should require a High School completed course of study, and those who now do or before 1905 should maintain a three-years' course; that the American Bar Association, with a membership radiating all over the

States and reflecting the matured and general views of the profession, passed formal resolutions in 1897 advising both changes; that the Board of Law Examiners of the State, prompted by convictions born of their valuable experience, recommended both the higher preparation and the longer courses; that men of conceded eminence, both at the Bar and on the Bench, as Judge Dillon in his Storrs lectures at Yale, and Judge Brewer of the Federal Court in an address before us, have expressed similar opinions; and that even the metropolitan press, brought to the subject by disgraceful conduct of one or more members of the Bar, have published their conviction that admission ought to be made "more arduous so as actually to discourage those who see in it only a cheap and easy way of getting into a profitable business." Such facts should assure the Court that in making the change it will not be struggling in advance of the sentiment of the day, but will simply put itself abreast of the current of popular thought and yield to an almost unanimous demand.

But I should not stop here. The proposed change must be examined on its merits, and the objections which have been made to it be fairly weighed in the balance. At the outset it is well to have before us the actual situation, and see what and where defects exist to which a remedy should be applied. During the year of 1900 the Board of Law Examiners received 899 applications and examined 876 candidates for admission. Of that number 113 failed once or more than once. Of the whole number only 157 came with an exclusive law office education, and the failures among them reached 25 per cent., while among those who had received in whole or in part a law school education the failures did not exceed 10 per cent. Only about 18 per cent. of the whole number depended upon the law office education alone. These facts are instructive. They show that the young men themselves realize the need of law school instruction, and only a small minority, probably under the pressure of financial needs, omit its advantages. It is obvious also that this minority, after three years of office study, fail to a very serious extent to pass the bar examinations and need at least an added year of study to bring them up to the proper standard of qualification. On the other hand

there is more of failure among the men of the schools than seems explainable by the nervous anxiety of the occasion or the accidents of unreflecting answers. The Examiners assure us that the percentage has been steadily lessening, due undoubtedly to the increasing severity of instruction, and with a uniform lifting of preparation and lengthening of courses the failures should nearly pass away and there should come a higher level of acquirement among those who succeed.

The advantage of a law school course of three years, I think, may be made clear by this consideration. A course of two years can only cover the technical subjects of study and that more or less by a process very like cramming. The classes are too large and the time too short. Much has to be omitted which is very useful and beneficial to allow of what is imperatively needed. The young man is gorged and has little opportunity to digest. And the things omitted under the compulsion of the narrowing time are precisely those which ought to be added to turn out something more than a cheap lawyer. What some of these neglected things are, often crowded out of a course of two years, I shall have occasion later to say, and to make my protest against the neglect.

I insist also that the shorter law school course completed with the present standard of previous acquirement tempts the young scholar to sacrifice thoroughness of preparation to speed of arrival. He sees that by cutting off the fourth and last year of the High School course and at once entering on his three years of law study he can get to the Bar in two years from what should have been his High School graduation. He ought not to be so tempted. It is a wrong to him and to the State. The citizens pay for his course and he has only to take it. Experience and ability have planned its length and its lines of study. It is due to the State which gives and the boy who receives that he should take the gift unutilized and complete, and reach that standard of education deemed so necessary to the citizen of a republic resting wholly on intelligence, that it is furnished without fee or reward.

I add another thought which, however, is both a thought and a fact. A low standard of preparation on the part of

the student compels a low standard of instruction on the part of the instructor. The teacher must get down to the level of the taught. The latter must understand, or they will not learn, and, if the teaching goes over their heads and wastes itself in the air, nothing has been accomplished. It is no light matter, this. It touches the capacity, the strength, the vital energy of the law professor himself. You cannot force him to teach day after day and year after year on the low level of present acquirement without a visible and tangible reaction on himself. He ceases to grow up while all the time compelled to grow down. Forced habitually to stoop, he soon forgets how to lift a free head into the air. Those only who have tried to make plain the difficult problems of which the law is full, and have seen how impossible it was to lift some of the insufficiently trained capacities before them to the level of comprehension, can appreciate how the effort shallows the current of thought, how it numbs vitality and saps courage and deadens ambition, and how it tends to lower and weaken the man himself. He ought to grow. The boys about him should be stimulants and not opiates. They should be bright and eager and questioning; putting him to his spurs, and capable of demanding and appreciating the best of his brain and heart, and not some truant from a high school's final year, hurrying to nail a shingle on a door. And so it is for the teacher as well as scholar that I urge the wisdom of more thorough preparation and a longer course of study.

I know the objection most commonly made that in this manner we may shut out those who cannot spare the added time, and whose necessities compel haste, and among whom will be some who are in all respects deserving. Judge Brewer, in an address before you, gave the complete and satisfactory answer, which has been cited in a report of the Law Examiners, but may well be repeated once more. He said: "A perfect answer is that a great many ought to be deterred. A growing multitude is crowding in who are not fit to be lawyers, who disgrace the profession after they are in it, who, in a scramble after a livelihood, are debasing the noblest of professions into the meanest of avocations." Let me add some pertinent facts. I have asked a friend of mine, whose daily occupation compels him to feed upon statistics,

a question as to the growth of the Bar, and he gives me these results: Taking into view the forty years from 1850 to 1890, the population of the State just about doubled, increasing from a little more than three millions to a little less than six millions, while, in the same period, the numbers of lawyers rose from 4,263 to 11,194, or 2,668 in excess of the rate of increase in the population of the State. What the census of last year will indicate will be known later, but I predict that it will show that, while population has somewhat more than doubled in forty years, the numbers of the Bar have trebled. In 1840 there was one lawyer to every 726 of the population, but in 1890 there was one to every 536. Very possibly the new census may show one to every 400; for, in 1895, 467 applicants were admitted to the Bar, while in 1900 there were 913, so that the number just about doubled in five years. Do you realize what these facts mean? They mean that the profession is becoming overcrowded; that the rush is an evil and a hardship, both to the old and the new members; that, in the struggle for patronage, the bold and blatant and unscrupulous may be pushing the modest and honorable and studious to the wall, and that, pressed by the necessities of a livelihood, there is danger that men may be tempted to gain money by very questionable means and are bringing scandal and disgrace upon our profession. Do I state this too strongly? Here again the Metropolitan Press, shocked by a recent rascality, has sounded a note of warning, and said to us from outside the profession, from the standpoint of good citizenship, these ominous words: "It will not be unfitting, either, to regard this as a warning or an admonition to our schools of law to be most conservative and circumspect in their work of adding to the ranks of the profession. There is reason to believe that the great numbers of graduates every year are overcrowding the profession, and that its overcrowded state and the consequent difficulty of making a competency in honorable practices are conditions which conduce to corrupt practices." If, therefore, the changes I advise *do* tend to lessen the number of applicants for admission to the Bar, I regard such result as a benefit and not a harm. The deterrent effects of those changes will keep out no young man who is fit to succeed, but the very increased

effort will make him a stronger and better man, and more worthy and likely to win in the struggle for place and for reputation. We need not fear for such men. No severity of preparation or length of study will scare them away. They are the stuff of which good lawyers are made and will not shrink from the labor or the time required. Rather they will welcome it as giving room for that thorough and deliberate study which they know to be an imperative necessity. I do not worry about them. They are as sure to come to us as they are to live. But the change *will* tend to shut the door on the idle, the lazy, and the unprepared. The members of the medical profession have already shut that door and locked it. They require a full High School course as the minimum of preparation, and then four years of study in some approved School of Medicine. They do not except or prefer the college graduate. He may be, he often is, better prepared, but the four years of study are essential and exacted. Even the veterinary student may not doctor a horse unless he has studied for two years in a competent institution. Is the law so much easier, so much simpler, so much less loaded with responsible duty, that a college graduate may practice it after a two years lingering in a law office and a non-graduate in one year more? I mean to get the responsibility for it out of my own hands at least; for it borders on disgrace to see the profession which should outrank all the rest trailing far in the rear and tempting with its easy-swinging doors a scramble of the unfit.

The change, if it shall come, will naturally be ordered to take effect far enough in the future to avoid interference with those who have already filed their certificates, and the interim will give ample time to provide for the new emergency. The schools will retain their advantage over the law office by the year added to its study-term. They should have that advantage. The student should be induced to prefer what all concede to be the better method of study.

And so I repeat that the time has come when the needed and desirable change should be made; that it is safe and just and useful to make it; that the opinion of the best authorities among Bar and people is in its favor; and, so believing, I hope the measure may be pressed with all the force which this Association can bring to the effort.

But changing the rules is not enough. It is much, but it is not all. When the Court has done *its* duty, the law schools must do *theirs*. With greater capacity in their students, due to a more thorough preliminary education, and three years instead of two in which to do their work, they will be able to teach more deliberately and expansively some things which they now teach in a hurried and imperfect way, and some things which the great majority of them do not teach at all. They must be alive to this duty, responsive to the new demands which the new opportunity, if it shall come, will bring with it. I have left myself room to indicate only two of the subjects which require the added time and the more thorough preparation.

I think the schools should devote more attention to practice than is commonly done. In 1898 a Committee of the American Bar Association, after specific inquiries made of twenty schools, declared: "It will not be unsafe to say that, as law classes are now taught, not one student in ten is able to draw an ordinary pleading in any of the usual forms of action without serious technical defects." What I have already said indicates that the young men will get that necessary knowledge nowhere else. They must become fairly skilled in the use of the tools with which their work is to be done. They must not be left with a good case and a full and studious comprehension of it to fall, nevertheless, over some section sprung from the cloudy depths of an ocean of Code. I do not mean that the whole of our Codes of Procedure should be studied, for the young man has but one life to live; but I do mean that the general outlines of procedure not likely to be seriously changed should be sifted out and put in their natural order for the student's use, and he should be required to draw such pleadings and papers as are incident to an ordinary litigation. Of course, it is very difficult, and probably impossible, to do that effectively in a course of two years already crowded with doctrinal study, but if the course be made longer, the difficulty will disappear, and the added opportunity may well be utilized for a more thorough instruction in practice.

Finally: There is one thing either not taught at all, or so rarely that it is exceptional, which should be taught in every school, and that is the science of jurisprudence, involving



the history and development of the law. In this country it is a national fault that we make lawyers, but never jurists; we study law as an art, but never as a science. That fault is an outcome of our intensely practical lives—never inclined to ask why, but always determined to know what. The mistake of it lies in this: Law is not a mere catalogue of arbitrary rules. If that were so, to know those rules would be enough. Law is a growth, and is growing yet, and will continue to grow when you and I are gone. It has its roots in the distant and dark past, and has pushed up out of the dark, adding girth to the stalk and branches to the stem, and throwing an ever-broadening shadow as it grew. One cannot know it thoroughly and well without knowing the process and phenomena of that growth, or realize the scope and meaning and true force of its doctrines without knowing whence and why they came, and by what attrition of time and circumstance they were rounded into their present shape. Not as we do does the Continental lawyer study law. For him there are no dry husks of doctrine; each is the vital development of a living germ. There is no single bud or fruit of it but has an ancestry of thousands of years; no topmost twig that does not green with the sap drawn from the dark burrows underground; no fiber torn away from it but has been twisted and strained by historic wheels. For him the Roman law, that masterpiece of national growth, is no sealed book to be sneered at as obsolete and elbowed out by a corpulent and insolent Code, but is a reservoir of doctrine drawn from the water-shed of a world's civilization. I would not go so far as did that Committee of the American Bar Association, whose report though unaccepted was an admirable product of their research and their thought. I would not say, as they did, that our whole system of study should be overthrown and in its place be put the study of law as a science and not merely as an art; but I do say that it is a shame to graduate a lawyer densely and absolutely ignorant of the history of his own profession; and that it is entirely possible with a better preparation and a longer course to parallel the lines of technical study with the elements of jurisprudence and the story of the law's share in the progress of civilization. It

there was no other single reason for increasing the required preparation and lengthening terms of study I should deem it an all-sufficient one that the change will furnish opportunity for and open the way to a study of the science of jurisprudence, and will tend to make our young men, not merely technical practitioners, but strong, intelligent, scholarly lawyers, and, what is equally needed, strong, intelligent and scholarly men. For these boys of ours are not to be mere lawyers. They may float for a while in the accustomed waters, but very soon an irresistible undertow sweeps them into the stormy sea and among the pounding waves of political life. They are to be our leaders, our civic rulers, our law makers. What law will *he* make who is stone blind to the law that *has* been made? How will *he* know how to guide our growth who does not understand the growth already attained? Shall we leave our legislator who is to be to propose ignorantly the experiment of laws which were tried and tested in the old years and finally thrown with a swing of disgust into the rag bin of fool projects? No, gentlemen of the bar, no! Our law schools must give us something more than the mere artisan who can draw a pleading or trip a lying witness. Their product must be *men* as well as lawyers, vitalized by the air of historic jurisprudence, fascinated by the absorbing interest of the study, strengthened and lifted by its world-old lessons. I grant that it is not an easy thing to do and that the teacher must first teach himself. But if one may do that in the gray of his gathering winter how much better may those do it who have youth and strength for their handmaids and years for their arena. I grant again that the young men will sometimes be both restless and doubtful, but if you take them firmly in hand and hold them to their work, very soon, if there is the making of a man in them, they will grow eager and joyous in the study, and some day add wealth to its domain. And so I plead with our admirable Court that the schools may have the opportunity through the requirement of higher preparation and longer lines of study to train up men who will be an honor to the profession and a blessing to the State.

And now I must relieve your patience. I have said what I should; I have done what I could. This effort in

behalf of legal education is possibly the last service which I can render to the State in which my life has been lived, and to which I owe both allegiance and gratitude. It might have been more interesting to have discussed before you some problem of the law or some unsettled question of historical jurisprudence; but what I have said has seemed to me a duty not to be postponed or neglected, or in any way subordinated to the mere pleasure of the occasion. No man knows more thoroughly than I do the need of speaking as I have spoken; and whatever the outcome I shall feel at least that I have not been unfaithful to my chosen profession.

F. M. FINCH.

### SOME CONSTITUTIONAL QUESTIONS SUGGESTED BY RECENT ACQUISITIONS.

THE conquest and purchase of the new territory which has come to us as the result of the Spanish war of 1898 has certainly stimulated the study of constitutional law and of the constitutional history of our country. Even to the hottest military ardor of the day it is becoming evident that in measuring and adjusting the results of war the Constitution must still be reckoned with; and that the Government of newly acquired territory, the rights and privileges of its inhabitants, the effect of both upon the citizens of the Hinterland, are problems which the sword alone cannot solve and the proper treatment of which requires them to be referred to the tests of constitutional requirements, if the experiment of self-government which originated with the adoption of that Constitution is to endure and continue its uplifting and beneficent influence upon humanity. In the course of one century the extent of that influence has so modified the methods of the motherland that the Dominion of Canada and the Federation of Australia have become realities, and even while the Transvaal Republic is struggling in the death grapple there looms up the possibility of a South African commonwealth that may give evidence of a self-government still more free from the central restraint than either of the predecessors already named. Only the example of the Nation which the exercise of self-government has developed out of the weak Atlantic Colonies who were only reluctantly driven to revolt by the accumulated injustice related in the Declaration, can account for the unbroken hope that stimulates the heroism in South Africa, and threatens to fuse into one common cause all the populations from Rhodesia to the Cape.

At this juncture it is whispered here and there that the Constitution in its integrity is inadequate to the spread of self-government over the new lands which we have com-

pelled a conquered foe to cede to us, and that it might be well to take a leaf from the English book of colonial government (the old edition of which was destroyed in 1776) rather than attempt the application of home principles to the tutelage of these unwelcome Uitlanders.

If in this process respect for these home principles and for the charter of the People which embodies them is to some extent undermined, no danger is perceived in that—at all events, none to be considered beside the aggrandisement of material wealth and property which the exploitation of outlying provinces by a home government promises to the generation of to-day.

We believe a careful study of the Constitution and of the history of our development under its prescriptions—a study made with a sincere desire to preserve its fundamental principles and to find in its provisions fair means of administering the property and respecting the lives and liberties of our new wards, carrying to them without derogation the vivifying influence of those principles, will reveal a ready way of accomplishing the desired result.

The first step in the acquisition of conquered territory is manifestly occupation—military occupation. The status during military occupation is not subject to doubt. As John Quincy Adams said in 1842, “when your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on according to the laws of war; and by the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present Constitution of the United States.”

He had already said in 1836: “The war power is only limited by the usage of nations. This power is tremendous. *It is strictly constitutional*, but it breaks down every barrier so anxiously erected for the protection of liberty and of life.”

Under these circumstances, there is no trammel to the governing power save the laws of civilization. Burdens, imposts, military contributions, everything that may harass the enemy for the benefit of the military occupant, short of

things concededly cruel and inhuman are lawful, constitutional. The occupation of the Town of Castine in Maine by the British soldiery in the war of 1812, the occupation of the Port of Tampico in Mexico by the American troops during the Mexican war, are instances of this temporary military rule, "strictly constitutional," as Mr. Adams says, but without any of the restraints which the Constitution provides for times of peace.

But this first step of military occupation and the constitutional exercise of the war power ends with a treaty of peace, with the cession of sovereignty to the conquering power. It was held that the surrender of Monterey in July, 1846, so displaced Mexican rule and established the authority of the United States that our Constitution was there in vigor, and the power which under that Constitution Congress has in the disposition of public lands became the law of that territory. Complete conquest, therefore, and permanent occupation put an end to that war power, and the constitutional barriers "so anxiously erected for the protection of liberty and of life," to quote from John Quincy Adams, are resurrected. The military occupation of the enemy's country ceases, and the constitutional power given to Congress over all territory of the United States not matured into Statehood comes into operation.

As our Supreme Court has repeatedly said, "every nation acquiring property by treaty or otherwise must hold it subject to the Constitution and laws of its own government" (3 How., 212-225). "Every nation which acquires territory by treaty or conquest holds it according to its own Constitution and laws" (9 How., 615). "The government *de facto* will, of course, exercise no power inconsistent with the powers of the Constitution of the United States, which is the supreme law of the land" (Cross v. Harrison, 16 How., 164).

Pending the exercise by Congress, however, of its rights and duties with reference to such government, the country is not left to lawlessness; if no officials are appointed to exercise the civil power nor any rules or laws laid down for its operation, the military officials in control of the conquered country constitute a *de facto* government until Congress shall provide another. As such *de facto*

civil government, they enforce the existing laws of the territory; the municipal law of the territory as it existed prior to the conquest, except where it is inconsistent with the Constitution or the laws of the conquering power and all laws of the conquering power that can practically be made applicable—even to the collection of duties generally imposed by the laws of Congress, are enforced in the new territory (*Cross v. Harrison*, 16 How., 164).

Now we reach the absolute cession of territory by the action of the treaty-making power. By such a cession it has been held newly acquired territory becomes “a part of the United States” and the full power of Congress to make “all needful rules and regulations” in respect to it is confirmed and no longer open to question.

We have seen that the acquired territory must always be held according to our own institutions, and that even the *de facto* government made up of the conquering military officials, must exercise no power inconsistent with the Constitution of the United States. It would seem to need no argument to establish the unavoidable inference that the Congressional government must be of the same character, that is, in accord with our institutions and in no way inconsistent with the Constitution, from which alone Congress derives its power.

Are these limitations any hindrance to the proper rule of new territories? The history of the development of our country has not shown any such hindrance. On the occasion of our first acquisition, the Louisiana purchase, there was considerable doubt in the minds of the statesmen who then held the reins of government as to the limits of our authority to acquire, but a careful investigation of the correspondence and documents of the time will show that the real doubt was as to the right of the treaty-making power to treat for the admission of new territory as a political member of the Union of the States. This was the quarrel with the language of the Louisiana treaty, which seemed to indicate a promise that the new territory should at once be incorporated into the Union as a State organization. There never was, however, any question during the interregnum between the acquisition of the territory and its admission to Statehood regarding its govern-

ment as territory. There were some suggestions as to the continuance of the old civil law rules which allowed cruel and inhuman punishment, but these nightmares never had any substance, for the continuance of these obnoxious provisions was totally negated by the recognized rule that the laws of the old sovereignty cannot prevail when they are in conflict with the fundamental principles of the new sovereign's constitution. The reason for this rule is not far to seek. It is a rule of international law recognized and adopted by our courts and therefore binding upon our Government that whenever territory is ceded, the municipal law there prevailing remains in force. But it will be seen that the sanction for these laws is in the new government, and the laws that prevailed under the former sovereignty only remain laws because of that sanction by the new sovereign. As decrees of an extinct nationality they can have no force, for they have lost all sanction; as customs adopted by the new nationality and enforced by its sanction, they obtain the dignity of law. This being the case, those of the old usages or customs or laws that are in conflict with the fundamental principles of the new nationality cannot remain in force, as they are without sanction.

Our history, therefore, has shown no insurmountable difficulty in governing new territory in accordance with the principles of protection to life, liberty and property, which are imperatively ordained by our Constitution, nor has there been any obstacle in preserving to the new communities such of their municipal laws as are not in conflict with those principles. Not only in Louisiana where the civil law rules so completely prevail, but throughout the various States of the Northwest can be found vestiges of that same civil law. It has been preserved wherever it was not in conflict with the recognition of those civil rights which the framers of the Constitution and of its Amendments have considered as the essentials of all representative and progressive government. It has nowhere been found, that uniformity of imposts, the equal apportionment of direct taxes, the privilege of peaceful assembly, the freedom from unreasonable search and other similar safeguards of the citizens against partiality or oppression have interfered with the early government of what Professor Hart



calls "Brother Jonathan's Colonies" all the way from Florida to Alaska.

What, then, can be the difficulties in the way of a constitutional government for these most recent acquisitions?

Apart from the dangers of the "open door"—and this is purely an "economic" fear—the main objection is the admission of these untrained inhabitants to the privilege of a voice in the molding of our government. The other objections stated relate to the impossibility of granting to the fighting Filipinos the constitutional privileges of bearing arms, of assembling, of *habeas corpus*, etc., etc., and to the questions arising from the condition of affairs in Cuba.

We will briefly examine these objections.

The situation in Cuba is anomalous. It has no precedent, and it makes no precedent.

The President took possession of Cuba, lawfully, under Constitutional warrant, in the exercise of a power distinctly conferred upon him. It was an act of lawful warfare.

It may be contended that upon the ratification of the Treaty of Peace the war power was withdrawn, and that the maintenance of the Army in Cuba is an unlawful usurpation by the President.

Again it may well be contended that the Cuban status is still a continuance of a military domination.

By the declaration of war the Commander-in-Chief authorizedly invaded, conquered and held the various islands of the enemy, the Philippines, Puerto Rico and Cuba.

By the Treaty of Peace the law-making power put an end to the war with Spain, compelled and accepted the cession to the United States of the Philippines and of Puerto Rico.

By the same Treaty the United States compelled the relinquishment of Spanish authority in and over Cuba.

The effect of this Treaty was to make the Philippines and Puerto Rico a part of the territory of the United States, to subject their inhabitants (with the exception set forth in the Treaty) to the jurisdiction of the United States Congress and as between their former sovereign, Spain, and the United States to re-establish peace and friendly relations.

The Treaty created with reference to Cuba an anomalous or at all events a novel position, perhaps without direct precedent, but not for that reason untenable; on the contrary capable of being dealt with in accord with established rules and usages among civilized people and the recognized responsibilities of international intercourse.

Through the arbitrament of war the United States had forced the evacuation of Cuba by the established authorities theretofore responsible to other nations for the maintenance of law and order; such a result imposed upon the United States direct responsibility for the maintenance of that public order, the guardian of which they had themselves replaced; it was their obligation to maintain that order until new agencies had been supplied, capable of performing that task—in other words, until a stable government had been organized and established.

This responsibility was the result of war, of lawful military intervention; the situation was military, and the military arm was the proper agency for its solution. Cuba, a foreign land, wrested through war from the domination of its sovereign, continued, until the domination of a competent new sovereign was fully assured, under the guardianship of the army that occupied it; no other agency is created or vested with power for the purpose by our Constitution.

The responsibilities for the continuance of law and order in Cuba are thrust upon the United States by the recognized canons of international law. This international law is a part of the law of the United States, so that by the law of the United States we remained responsible for the preservation of all rights in Cuba. We have no other power through which to protect that responsibility than the military power which created it.

Under the provisions of the treaty of peace Spain relinquished all claim to sovereignty over and title to Cuba (Art. I), and as the Island was upon its evacuation by Spain to be *occupied* by the United States, the United States will, so long as such *occupation* shall last, assume and discharge the obligations that may under international law *result from the fact of its occupation* for the protection of life and property.

The treaty further provided that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof (Art. XVI) that Spanish subjects may remain in Cuba, retaining all their rights to property and the right to carry on their industries, commerce and professions (Art. IX), and that the inhabitants shall be secured in the free exercise of their religion.

(Art. X) These are among the responsibilities which the United States assumed during its occupancy of the territory.

As to the Filipinos, the existence of an armed insurrection continues a military status such as was recognized during the War of the Rebellion, which, temporarily at least, suspends the application of the constitutional guarantees which must unquestionably revive upon the restoration of actual peace.

That this condition of insurrection authorizes the Executive to assume the functions of a legislature, we do not admit. The war power is great, but beyond the military decrees essential to the preservation of the army and the destruction of the enemy, we are not aware that it has ever been extended and the experiment now being made of general and permanent legislation by a Commission enacting laws "by authority of the President," is an ultra constitutional experiment which it is to be hoped will not be permitted to ripen into a mischievous precedent.

There remains the third and main objection, that the recognition of any constitutional rights in the inhabitants of the new territory would fasten them upon our body politic as the potent factor in the shaping of our laws and of our governmental policy, giving them that voting power, the misuse and the purchase of which has been such a sad element in much of the misgovernment of which the people complain.

It ought to be a sufficient answer to this supposed dread to point to the Territory of New Mexico, which has been under Territorial or Colonial government for more than half a century, and is still voiceless in the councils of the nation and an unsalable quantity in the political domain.

It may be well, however, to supplement the indication

of this living example by a brief reference to the difference between the Nationality which the new territory and its inhabitants have acquired, and that Citizenship which wields the political franchise and which alone gives a voice in the affairs of State.

When a territory is ceded by a treaty, it becomes part of the nation to which it is annexed. The people owe to it their allegiance; their relation to their ancient sovereign is dissolved; the same act which transfers the country transfers the allegiance of those who remain in it (*Am. Ins. Co. v. Canter*, 1 Pet., 542).

We have, then, the Spanish Territory and we have the allegiance of its inhabitants. In return for this allegiance the Government owes them protection. It is as yet under no obligation to confer upon them the political franchise. This territory is, as Chief Justice Marshall said, in "a state of infancy advancing to manhood, looking forward to complete equality, as soon as that state of manhood shall be attained" (5 Wheat., 334).

"Territories acquired by Congress, whether by deed of cession from the original States or by treaty with a foreign country, are held with the object, *as soon as their population and condition justify*, of being admitted into the Union upon an equal footing with the original States in all respects" (*Shively v. Bowlby*, 152 U. S., 49).

Congress is the judge under the Constitution as to when it is reasonable and proper to admit these new accessions to the exercise of the franchise and to the dignity and power of Statehood. This distinction between Nationals, as persons owing allegiance and entitled to protection, and Citizens possessing political rights, admits of no discussion. It has been pointed out again and again, and the two most recent and notable cases will be sufficient for reference (*Miner v. Happersett*, 21 Wall., 162; *Wong Kim Ark*, 169 U. S., 167). And it is equally established that this first stage of the "national" is conferred by the mere cession and transfer of territory (*Halleck*, page 824; *Phillimore I*, page 449).

We are unable, therefore, to find any obstacle in the prescriptions of the Constitution to the complete and proper government of the new territories which we have acquired at the cost of so much blood and treasure, and it may, per-

haps, be added, of so much conservative and invaluable tradition. It is earnestly to be hoped that this tradition will not be further shattered by the constant endeavor to set aside the Constitution in the administration of the affairs of these new citizens.

It is time to discard the idea that we owe no duties to the inhabitants of the newly acquired territory and that Congress is vested with absolute authority to dispose of their personal and civil rights as well as to determine their political status.

There are certain civil rights which not even a Treaty can vest Congress with the power of refusing, for, as we have already seen, the territory acquired must be governed in accordance with the principles of our Constitution, which no treaty can override.

This pretense that the Constitution does not protect anything outside the boundaries of the States is not new. It has repeatedly been endeavored to apply that rule to our organized territories, and as repeatedly has our Supreme Court rejected the claim. "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which *restrain all the agencies of government, state or national*. Their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States" (*Murphy v. Ramsey*, 114 U. S., 44).

This subjection of Congress in dealing with personal and civil rights arises from "the general spirit of the Constitution from which Congress derives all its powers" (*Mormon Church*, 136 U. S., 67).

Even Mr. Webster contending against the slave power which claimed that the Constitution protected its property rights in the new Territories, and endeavoring to show that the Territories were not of right entitled to any of its immunities was forced to this admission: "I do not say that while we sit here to make laws for these territories, we are not bound by every one of the great principles which are intended as securities for public liberty" (*Curtis' Life*, II, 366).

As Mr. Carlisle has said, "the constitutional question is

the same here as it was there; but the contestants have changed places. Then the unlimited power of Congress over the territories was denied by the advocates of slavery, and now it is denied by the advocates of freedom. It is a strange transformation that has made the arguments in support of constitutional slavery in the territories the most powerful weapon in the hands of those who are contending for constitutional liberty in every part of the land where the civil authority or military power of the United States is exercised for the government of the people."

In order to support the restricted application of the Constitution now contended for, the fundamental character of the government established by the people when the Constitution was adopted must be weakened and distorted, and it must be assumed that such government was not intended to carry out the principles of the Declaration, and to create everywhere within its jurisdiction complete self-government, but rather that its purpose was the creation of a dual system, a constitutional self-government for the original States and a congressional extra constitutional government for every other part of the national domain.

This is to construe the Constitution as narrowly as a criminal statute, and to deny it that broad interpretation to which it is entitled as the greatest "enabling act" of modern times whose protective scope should always be amplified and never restricted. Protection of all personal and civil rights was its paramount purpose, and that purpose should be put into execution by such an interpretation as will always aid and never hamper it.

The misconception of the situation is due largely to the loose and general use of the misleading expression "extending the Constitution to outlying territory."

This is an inapt use of terms and it is equally a misuse of terms to speak of new peoples and new possessions coming under the Constitution. The Constitution has no direct relation with new peoples or new possessions. It has a direct relation only with the agencies of government which it creates and which it regulates, on the one side, and with the people who ordain it on the other. It endows certain functionaries of the Government with certain authority; it lays down rules and principles which must be

observed in the government which it establishes; it grants powers, privileges and immunities, and it enacts prohibitions and definite limitations which may not be overlooked or evaded by the agencies of the Government which it establishes. As Mr. Webster said, "while we sit here to make laws, we are bound by every one of the great principles which are intended as securities for public liberty."

That these powers are sufficient and these restrictions not an obstacle to government of the new territories is certain, unless it is desired to have unequal taxation, unequal burdens, unequal opportunities of development, and such a radically different application of the modern principles of freedom as would make our recent acquisitions subject and abject dependencies.

PAUL FULLER.

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The election to the Board of Editors of the COLUMBIA LAW REVIEW of William E. Baird, Bridgham Curtis and John W. Parks is announced.

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## NOTES.

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ABSTRACTION OF SUBSURFACE WATER FROM ANOTHER'S LAND.—  
The right to have the water flowing in a well-defined natural stream—whether on the surface, or not—continue so to flow has long been recognized as one of the natural incidents of the ownership of land. A riparian proprietor may lawfully take from the stream as much water as he may need on his land for agricultural, domestic, or manufacturing purposes not inconsistent with a similar right in the owners of the land above and below. That the law of water courses is not applicable to water percolating underground was decided in the leading case of *Acton v. Blundell*, 12 M. & W., 324 (1843). The Court declared that one may appropriate water coming naturally upon his land, if its course be invisible and undefined, not only to the same extent, and for the same purposes as he would be entitled to use that flowing in a stream, but, in addition may intercept or



divert it entirely, if this be necessary to the ordinary use or improvement of his land even, though the result be the cutting off of the sources of his neighbor's well, or the withdrawal of water already collected therein. This case has been followed generally throughout the United States.

In *Chasemore v. Richards*, 7 H. L. C. 349 (1859), percolating water was appropriated to be sold to the inhabitants of a village. The plaintiff complained of the interception of the sources of his mill-stream, but the House of Lords refused to allow him to recover, holding that the right to take underground water is not dependent upon the purpose for which it is diverted, thus recognizing and extending the doctrine laid down in *Acton v. Blundell*. This view had been taken in Vermont in a case of malicious interception, *Chatfield v. Wilson*, 28 Vt., 49 (1855). In England the right to interfere with the course of surface water not confined in a stream had previously been declared to be absolute, *Broadbent v. Ramsbotham*, 11 Ex. 602 (1856).

While decisions affirming the right of a land owner to intercept percolating water before it reaches another's land are numerous, cases dealing with the withdrawal of such water from the land of another are scarcely to be found. It is held that by inducing percolation one may take water from his neighbor's well, *New River Co. v. Johnson*, 2 E. & E. 435, (1860); but not from his stream, *Canal Co. v. Shugar*, L. R. 6 Ch. 483 (1871). It is difficult to see on what principle this distinction can be made.

In a recent New York case, *Forbell v. City of New York*, 160 N. Y. 357 (1899), no interference with well or stream was charged. By means of powerful suction pumps erected in wells driven on its own property the defendant municipal corporation daily withdrew quantities of subsurface water from the plaintiff's land. The Court granted relief to the plaintiff on the ground that to be lawful the appropriation of underground water must be for purposes connected with the ordinary use or improvement of the land, thus repudiating the doctrine of *Chasemore v. Richards*, *supra*, and adopting the view expressed by Lord Wensleydale in that case. The decision seems to represent a logical development of the common law as laid down in *Acton v. Blundell*.

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**RIPARIAN PROPRIETORS; TAKING PRIVATE PROPERTY WITHOUT JUST COMPENSATION.**—The U. S. Supreme Court on November 12, 1900, decided that to cut off a riparian owner from access to navigable waters was not taking private property without just compensation, *Scranton v. Wheeler*, 21 Sup. Rep. 48. The plaintiff owned land originally granted by U. S. patent and bounded by "the right bank of the Ste. Marie River," Michigan. A Government pier has been built in the river bed which entirely cuts off the plaintiff's access to the river. Even if the plaintiff owned the fee of the river bed, says HARLAN, J., he acquired the same subject to the right of the Government to improve navigation

and so subject to "the possibility that such right might become valueless." The reply of SHIRAS, J., dissenting, with whom GRAY and PECKHAM, J. J., concur, would seem to be most pertinent; the knowledge that private property is liable to be taken for a public purpose has not hitherto been supposed to deprive the owner of the right of just compensation. The learned Justice HARLAN fails to distinguish between the ownership of the fee of the highway and the abutting owner's right of access. Ownership of the former, as he says, is immaterial since it is already servient to an easement, and improving this easement takes no property from the plaintiff unless a distinct property right is affected. That the right of access may be such a distinct property right does not appear to have occurred to the learned Justice. Yet such is the English law. *Rose v. Groves*, 5 Mann. & G., 613 (1843); *Lyon v. Fishmongers Co.*, L. R., 1 App. Cas., 662 (1876). Such intangible rights have received slow recognition except where the early common law doctrines of trespass could not be invoked. Such were the N. Y. Elevated Railway cases where the plaintiffs did not own the fee of the street. *Story v. N. Y. El. R. Co.*, 90 N. Y., 122 (1882); *Hare Amer. Const. Law*, 372. Compare also *Haskell v. New Bedford*, 108 Mass., 208 (1871); *Brayton v. Fall River*, 113 Mass., 218 (1873); *Delaplaine v. Chic. & N. W. R. Co.*, 42 Wis., 214 (1877); *Brisbine v. St. P. & S. C. R. Co.*, 23 Minn., 114 (1876); *Ind. B. & W. R. Co. v. Eberle*, 110 Ind., 542 (1886); *Steers v. Brooklyn*, 101 N. Y., 51 (1885). It is submitted that cases holding contra are opposed to justice and the general trend of authority, *Gould v. H. R. R. Co.*, 6 N. Y., 522 (1852); *Stevens v. Patterson*, 34 N. J. 532 (1870); *Tomlin v. Dubuque R. Co.*, 32 Ia., 106 (1871). "So far as these cases justify the cutting off of a riparian proprietor they justify taking of property without just compensation." *Cooley Const. Law*, 6th Ed., 670, note 1.

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AGENCY—EMPLOYER'S LIABILITY TO SURGEON FOR CARE OF INJURED EMPLOYEE.—The master is under no legal obligation to provide medical attendance for a servant injured in the course of his employment, whether the injury sustained be traceable to the employer's fault, or not, though in the former event the expense incurred may be included in the damages recovered for the injury.

The question whether, and under what circumstances, an agent of the employer, not expressly authorized therefor, may bind his principal by hiring a surgeon in an emergency to save a servant's life has been before the courts on numerous occasions in recent years, and in many of these instances the injured man has been one employed by a railway company.

It has often been held that a general agent of a railway corporation may bind his company by contract for such medical attendance as is necessary for the injured servant, though it seems difficult to support these decisions on any sound principle of agency. *Toledo, etc., Ry. v. Rodriques*, 47 Ill. 188 (1868); *Walker v. G. W. Ry.*

*Co.*, L. R. 2 Exch. 228 (1867); *Sevier v. R. R. Co.*, 92 Ala. 258 (1890).

Some courts in dealing with these cases have gone so far as to hold that the servant present, who is highest in authority, has the requisite power conferred on him by the necessity of the occasion. *Ry. Co. v. McMurry*, 98 Ind. 358 (1885); *Ind. & St. L. Co. v. Morris*, 67 Ill. 295 (1873). Recovery is certainly not to be sustained on the theory of quasi-contracts if the grade of the agent and not the necessity is to determine the principal's liability.

In a recent Kentucky case, *Godshaw v. Struck*, 58 S. W. 781, the foreman of the defendant contractor employed the plaintiff to attend a workman injured by a falling brick. The Court of Appeals denied the surgeon's right to recover, holding that the doctrine of the railway cases applied exclusively to them. Undoubtedly, the defendant should not be held liable *Swasey v. Mfg. Co.*, 42 Conn. 556 (1875); *Chaplin v. Freeland*, 34 N. E. 1007 (Ind., 1893), but if the anomalous doctrine of the railway cases is recognized, it is not clear why it is not extended to other cases within the reason of the rule.

It is said that men in the railway service are usually at work far from their homes, and are apt to be injured when in localities where they have neither friends nor credit. *Chaplin v. Freeland*, *supra*. But these statements are equally true with respect to thousands of workmen living in the suburbs of any one of our great manufacturing centers—many of whom are engaged in occupations quite as hazardous as that of the railway employees.

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PROTECTION OF BUSINESS OR OCCUPATION.—The first case in which an action was allowed for improper interference with a man's employment or business seems to have been *Garret v. Taylor*, Cro. Jac., 567, in the 18th year of James I, where plaintiff was given damages against defendant, who had driven away workmen and customers from plaintiff's quarry by threats of violence and of law-suits. In a long series of cases at law and in equity the English courts worked out the principles of their jurisdiction in such matters. But in the case of *Allen v. Flood*, L. R., 1898, App. Cas. 1, the earlier cases were exhaustively reviewed and the House of Lords, overruling the view of the lower courts and of most (six out of eight) of the Judges whose opinion was asked, held that to procure a workman's discharge, where he had no binding contract of employment, and to prevent his future employment, by threats of strikes, etc., violated no legal right of the workman. Both the decision and the reasoning by which it was reached substantially alter the law as previously understood, and sufficient time has not elapsed for the English courts to build on this new foundation.

Most of the reported cases in the United States arose upon applications for injunctions as a suit for damages is usually an utterly inadequate remedy. The general rule in this country agrees rather with the views held in England before *Allen v. Flood*, than with

those laid down by the House of Lords in that case. An employer may engage whom he likes; an employee may work for whom he chooses; aside, of course, from special contracts. Generally, workmen may combine to obtain better wages, etc., and may strike—and endeavor to persuade others to leave, or not go to work, so long as peaceable means only are employed; but they may not use their organizations to compel the discharge of other workmen, either by violence or by strikes, threats, etc. *Curran v. Galen*, 152 N. Y. 33 (1897); *Cumberland, etc., Co. v. Glass Assn.*, N. J. 46 Atl. 208 (1899); *Beck vs. Teamsters' Union*, 118 Mich. 497 (1898); *Amer. Steel, etc., Co. vs. Wire Drawers, etc., Union*, 90 Fed. 608 (1899); 28 Law. Rep. Ann. 464, note. In a number of States, of which New York and New Jersey are examples, the right to combine and strike to better their condition, is given to workmen by statute.

In the recent case of *National Protective Assn. v. Cuming*, 53 App. Div., 227 (1900) the New York Supreme Court follows *Allen v. Flood* rather than the American cases. In view of the fact that a considerable proportion of the cases are brought by workmen whose livelihood is in danger, e.g., *Curran v. Galen*, 152 N. Y., 33; *Plant v. Woods*, 57 N. E. 1011; Mass. (1900) and this very case of *Nat'l Assn. v. Cuming*; the advisability of restricting the authority now exercised by the Courts is at least questionable, for in such cases it is certainly used to protect individual freedom. It is doubtful, however, if the Court of Appeals will sustain the distinction attempted to be drawn between the *Cuming* case and *Curran v. Galen*.

For a discussion of the charges of "Government by Injunction" which have been made in connection with these and similar cases, see *Amer. Steel, etc., Co. v. Wire Drawers, etc., Union*, *supra*; *Shoe Co. v. Saxey*, 131 Mo. 212; (1895) *Matter of Debs*, 158 U. S., 564; (1844) 28 L. R. A., 464, note.

REMOVAL OF CAUSES. CITIZENSHIP OF CORPORATION.—*Walters v. C. B. & Q. R. R. Co.*, 104 Fed. 377 (Cir. Ct., D. of Neb., Oct. 3, 1900).

A corporation, as existing only by act of the Legislature, would seem to have a separate existence, for purposes of citizenship, in each State where it has been recognized by an incorporating as distinguished from a mere enabling act (*Morawetz, Corporations*, § 996, 999). Recent federal decisions apparently tend to nullify this distinction in matters of jurisdiction.

In *R. R. Co. v. Whitton*, 13 Wall. 283 (1871) the Supreme Court allowed a citizen of Illinois to sue defendant corporation in the Circuit Court of Wisconsin, where the cause of action arose, though defendant had also been incorporated in Illinois. In *R. R. Co. v. James*, 162 U. S. 545 (1895), a citizen of Missouri sued a corporation of the same State in the District Court of Arkansas for injuries received in Missouri. Held, the action must fail for want of

diversity of citizenship, the defendant having been merely "adopted" in Arkansas with the privileges of a domestic corporation but "not incorporated as such." A dictum added that defendant could not become a corporation of Arkansas for purposes of citizenship unless created out of natural persons whose citizenship could be imputed to the corporation itself." The *Whitton* case (*supra*) was, however, expressly distinguished on the ground of actual incorporation in Wisconsin, while HARLAN, *J.*, dissenting, thought there had been such incorporation in the case at bar. Next came *Louisville N. A. Co. v. Trust Co.* 174 U. S. 552 (1898), a bill in equity by a corporation of Indiana, also incorporated in Kentucky, against a citizen of Kentucky. Suit in the District Court was allowed, the dictum of the previous case being confirmed, and the rule laid down that a corporation remains for jurisdictional purposes a citizen of the State where it was originally incorporated.

The rule so given has but recently been applied in *Walters v. The C. B. & Q. R. R. Co.* (*supra*). Defendant, originally incorporated in Illinois, had subsequently become a domestic corporation under the laws of Nebraska. A citizen of Nebraska sued in the Nebraska courts. *Held*, defendant may remove. Its citizenship remained that of the State of its original creation, it having been created in Nebraska out of an existing foreign corporation. "It was the citizenship of defendant that determined the jurisdiction of the Court, and not the question whether it was a corporation in Nebraska.

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CONSTITUTIONAL LAW—TAXATION—DISCRIMINATION AGAINST NON-RESIDENT STOCKHOLDERS.—It has been recently held in Connecticut, (*State v. Travelers' Insurance Co.*; see RECENT DECISIONS) that a State tax may be levied on domestic corporations on the basis of the value of shares held by non-residents.

In the opinion of the court it seems to be assumed that the tax in question fell on the individual non-resident stockholders because of their obligation to reimburse the corporation for an expense specially incurred on their account. No statute is cited which provides for such reimbursement. If the corporations paying the tax could not legally enforce such reimbursement by the exercise of a lien on dividends, or otherwise, the tax would simply be one on domestic corporations classified in a certain way. No question could be raised as to the constitutionality of the tax. For, as the court explains, there is no provision in the constitution of Connecticut that "taxation shall be uniform and equal," and in the absence of such a provision there is no State limitation on the legislative power which can enable the courts to declare unconstitutional laws classifying persons or property and discriminating between these classes when laying the burden of taxation. *Knowlton v. Moore*, 20 Sup. Ct., 747 (1900); nor does the XIVth amendment, U. S. Const., limit the taxing power of State legislatures in this particular—*Slaughter House Cases*, 16 Wall. 36 (1872); *Maxwell v. Dow*, 20 Sup. Ct., 448 (1900).

But if we accept the view of the Court as to the effect of the law; if the tax is to be regarded as falling on the individual non-resident stockholders, the corporation acting merely as agent for payment, it is submitted that the law in question violated Art. IV, Sec. 2, U. S. Constitution ("the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"), and that the reasoning of the court is open to question. The court argues: (a) that "privileges and immunities" under Art. IV, Sec. 2, are "those civil rights belonging to all citizens of the State" "by virtue of their citizenship"; (b) that uniformity of taxation could not be insisted on by citizens of Connecticut among themselves; that the legislature could divide them into classes on the basis of residence within the State and tax these classes unequally; (c) that therefore the legislature could classify shareholders in its domestic corporations on the basis of residence in and out of the State and might tax these two classes differently. There is here a *non sequitur*. We cannot say that because A has only those rights which B has, and B has not right X, therefore A has not right Y. Citizens of Connecticut may not have the right to insist on "uniformity" and "equality" in taxation of classes within the State; but they can protest against special taxation. Now it is this right to immunity from special taxation which the statute in this case invaded. Each non-resident was taxed differently from all citizens of Connecticut, without regard to classification of citizens within the State. [For a case where non-residents were properly classified, see *Redd v. St. Francis*, in 17 Ark., 416 (1856)]. This amounted to special taxation of each non-resident shareholder. For "special taxation," if used within reference to A. B, a citizen of Connecticut, would mean that A. B, without regard to classification of citizens within the State, had been taxed differently from all other citizens of the State.

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TAXATION—SITUS OF STOCK.—It was further contended by the Court in *State v. Traveler's Ins. Co.*, that by purchasing shares of stock in a domestic corporation, non-residents participated in the grant of a corporate franchise; that the discriminating tax was incidental to the grant (the defendant's charter in this case was amendable or repealable at pleasure); that, therefore, the obligation to submit to the discriminating tax was incidental to the acceptance and enjoyment of the grant. Can a distinction, then, be drawn between natural tangible property, and property artificially created by the Legislature? May a State impose a special tax on shares of stock in one of its own corporations, when owned by non-residents, on the ground that the State created the property? It is submitted that this theory (25 Am. and Eng. Cyc. of L., 664) is unsound and finds no support in those cases cited to sustain it, which recognize only the power of the State to fix the *situs* of shares in a domestic corporation within the State for purposes of taxation, to the extent of separating this *situs* from the residence of the owner. This

power of the State may be conceded. A State when creating property may specify its attributes, *e. g.*, that it can never wholly be removed out of the State so as to become untaxable therein; that shares owned by a non-resident shall be deemed to exist at a certain place within the State (*semble*, even though the local tax rate at that place be the highest within the State). The creating power may make a "law for the property," *Tappan v. Bank*, 19 Wall., 490 (1873); per WAITE, C. J., *i. e.*, define its nature. But once the *nature* of the property is fixed, once the attribute of salability is given to it, it cannot then be treated specially when non-residents are concerned with it. The case of *Stockholders v. Board et al.*, 13 S. E., Va., 407 (1891), and *American Coal Co. v. County Comr's* 59 Md., 185 (1882), (*Cf.*, 57 Md., 31; Thompson on Corporations, § 2849) recognized only the right to fix the *situs* of stock owned by non-residents. In these cases the stock, once its *situs* had been determined, was all liable to municipal taxation. Any difference in the degree of taxation arose from the location of the stock, not from a special tax founded on non-residence of the owners.

In *Corfield v. Coryell*, 4 Wash. C. C., 371, 381 (1823) [quoted with approval, *Blake v. McClung* (172 U. S., 239, 1898)], "the right to take, hold, and possess property" "of every kind," was recognized as one of the "privileges" guarded by Art. IV, Sec. 2, U. S. Constitution. Are not shares of stock to be included in this classification?

If a State wishes to tax shares, in its own corporations, owned by non-residents, which would ordinarily escape taxation, it must either impose a special tax on corporations, to be borne by all stockholders; or else fix the *situs* of the shares by legislation, and thus subject them to local taxation.

## RECENT DECISIONS.

**AGENCY—CORPORATE ENTITY.**—Plaintiff was engaged by defendant, an insurance company, for a term of years as "General Manager of Agencies," having entire charge of securing business for the corporation, and was discharged at the end of six months because he had solicited proxies in a manner warranting the supposition that they would be voted to continue the existing Board in office, from the policyholders of the company, who were also the shareholders, authorizing a member of the Board of Directors to vote their shares, but with the intention that the proxies should be used to oust the existing Board. The trial Court found that the plaintiff acted in good faith, and awarded him \$50,000 damages, which decision was reversed by the Appellate Division and a new trial ordered, on the ground that the plaintiff had been guilty of a breach of faith as an agent towards his principal. *Townsley v. The Bankers' Life Insurance Co. of the City of New York*, 55 App. Div.\*

This decision of the Appellate Division seems to be open to criticism, for two reasons. In the first place, the Court applies the rule that an agent owes his principal the utmost good faith in matters within the scope of his agency (citing 1 Am. & Eng. Enc. of Law, 2d Ed., p. 1071; 1 Story's Eq., 9th Ed., p. 304; Mechem on Agency, § 454) to a matter wholly outside and collateral to the agency, where it is inapplicable. *Mechem on Agency*, 1st Edition, § 460; *Collins v. Sullivan*, 135 Mass., 461 (1883). It was no part of the plaintiff's duty to solicit proxies, and in so doing he was not acting as an agent of the company. It cannot be said that the plaintiff would have been subject to an action had any stockholder felt aggrieved. In the second place, the Court fails to distinguish between the corporate entity and the policyholders, saying that "there is no distinction to be drawn between the corporation and its members," a statement which cannot be supported. *The Queen v. Arnaud*, 16 L. J. Q. B. N. S. 50 (1846); *Gallegher v. Germania Brewing Co.*, 53 Minn. 214 (1893). Bearing this in mind it is plain that any duty owed by the plaintiff as agent was due to the corporation, his employer, and not to the stockholders, with whom he had no contract relation whatever, and the plaintiff was not guilty of a breach of faith towards his employer by deceiving a third party. Even taking the position that a shareholder while voting is doing a corporate act, and consequently is an agent for the time, the situation of the defendant is not improved, as from that point of view the finding of the trial Court that the plaintiff was acting in good faith becomes important. Unless the plaintiff would be liable for deceit in an action brought by the corporation for a fraud on the stockholder, it cannot be said that the breach of faith was toward his employer.

**AGENCY—SCOPE OF AUTHORITY—MEDICAL ATTENDANCE.**—A laborer employed by the defendant contractor was severely injured through the negligence of a fellow-servant. The foreman in charge hired a surgeon. *Held*, that the surgeon cannot recover his fees from the contractor. *Godshaw v. Struck*, 58 S. W. 781. (Ky., Oct. 31, 1900). SEE NOTES.

**ATTACHMENT—OF NON-RESIDENT'S INTEREST IN STOCK OF FOREIGN CORPORATION PLEDGED TO RESIDENT.**—Assuming transfer by pledgor to pledgee conferred apparent title and enabled enforcement of security by sale, *Held*, where certificates of stock of foreign corporation belonging to a non-resident are in possession of a resident as pledgee, the interest of pledgor can be attached by service of notice on pledgee under Sect.

\* Not yet reported.



649, subd. 3, of the Code. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193 (Dec., 1900).

In *Plimpton v. Bigelow*, 93 N. Y. 592 (1883), plaintiff attempted to attach shares of non-resident in foreign corporation by levy on officer of corporation in N. Y. *Held*, situs of stock is domicile of corporation or of shareholder. Nor would it have mattered had the certificate been in the jurisdiction (*Cook, Corporations*, 485). A certificate is merely evidence of a right. But in *Warner v. Fourth Nat. Bank*, 115 N. Y. 251 (1889), non-resident bank, X, pledged certain notes with resident, Y, to secure loan; *held*, on a claim against X, plaintiff could attach property in possession of Y under Sect. 649, subd. 3. Subject of attachment was the intangible *chose in action*, the right of X to receive surplus realized by sale of pledge.

In *Plimpton v. Bigelow* there was no property in the jurisdiction capable of attachment. But in case at bar, *held*, defendant had transferred to pledgee his interest in foreign corporation, retaining a right of action which, within *Warner v. Bank*, constituted property inside the State. Like a certificate, a bill or note is only evidence of a right. In support of this, *R. R. Co. v. Schuyler*, 34 N. Y. 30 (1865), might have been cited to effect that pledgee having title as between himself and pledgor, by virtue of possession of certificate with power of attorney, was as to latter a sort of trustee. Contra, the argument that pledgee had merely an irrevocable right to make himself owner of shares by transfer on books of company, and that, until the right was exercised, the property remained in defendant outside the jurisdiction. However, the Court seems to have chosen the first alternative.

**CARRIERS OF PASSENGERS—STATION ACCOMMODATIONS AT DESTINATION.**—A passenger was injured by falling from an unrailed platform after getting off defendant's train at an unlighted station where there was no station agent. *Held*, she continued to be a passenger until she had a reasonable time, under all the circumstances, to leave the station. *Chicago, R. I. & P. Ry. Co. v. Wood*, 104 Fed. 663 (C. C. A. Kan., Oct., 1900).

Carriers are bound to provide safe and convenient modes of access to and departure from their trains. *Hutchinson on Carriers*, § 516. In holding that this plaintiff was, at the time, entitled to the privileges of a passenger, the Court has taken one step in advance of the recorded decisions, but a step which inevitably resulted from them. *Carpenter v. Railroad Co.*, 97 N. Y. 494 (1884); *Brassell v. Railroad Co.*, 84 N. Y. 241 (1881); *Railroad Co. v. Riley*, 39 Ind. 568 (1872); *McKimble v. Railroad Co.*, 139 Mass. 542 (1885); *Pennsylvania Co. v. McCaffae*, 173 Ill. 169 (1898); *Ry. Co. v. King*, 99 Fed. 251 (Ky., 1900).

**CONSTITUTIONAL LAW—TAXATION—RIGHT OF A STATE TO IMPOSE A SPECIAL TAX ON DOMESTIC CORPORATIONS FOR SHARES OF STOCK HELD BY NON-RESIDENTS.**—By Sections 3836 and 3916, Gen. St. of Connecticut, amended 1897, shares of capital stock in certain domestic corporations, when owned by resident stockholders, were made subject to municipal taxation; but in the case of non-resident stockholders the secretary of the company was required to file with the State Comptroller a list giving the number and value of the shares held by each, and to pay annually to the State one and one-half per cent. of the said value. The defendant corporation refused to pay the tax demanded of it in 1898 on the value of its shares owned by non-residents. Suit to recover the amount of the tax. *Held*, on demurrer which assumed that the burden of the tax for the year under these sections of the law would bear more heavily on non-residents than on residents: that the provisions of the law were constitutional. Judgment for plaintiff. *State v. Traveler's Ins. Co.*, Sup. Ct. of Errors of Conn. 47 Atl. 299 (Oct. 17, 1900.) SEE NOTES.

**CONTRACTS—INDEFINITENESS OF PRICE—NOMINAL DAMAGES.**—Breach of a contract to accept news for a certain unexpired time, "price not to exceed \$300 per week." Defense, inability to agree on intermediate price, maximum only being fixed. Nominal damages awarded on ground that

indefiniteness of price precluded recovery of substantial damages. *United Press Co. v. New York Press Co.*, 58 N. E. 527 (N. Y., Nov. 1900).

The decision is peculiar in that the Court while holding that because an intermediate price was left to be agreed upon and contract had no binding force, awarded nominal damages. It would seem that the instrument was, rather, void for indefiniteness. *Clark on Contracts*, 63; *Smoyer v. Roth*, 13 Atl. 191 (Penn., 1888); *Brown v. N. Y. Central*, 44 N. Y. 79 (1870); *Buckmaster v. Consumers Ice Co.*, 5 Daly, 313 (N. Y. 1874); *Acebat v. Levy*, 10 Bing. 376 (Eng., 1834). The argument of the principal case goes to show not an actual infringement of a right, but an incomplete and unenforceable instrument. To be distinguished from *Kennedy v. McKone*, 10 App. Div., 88 (N. Y., 1896). Though this contract contained a similar term, it had been executed, and recovery was *quantum valebat*. Nominal damages, however, in the principal case did not carry costs, and the judgment is virtually for the defendant.

**DOMESTIC RELATIONS—ALIENATION OF AFFECTIONS.**—In a suit by the husband against the parents of his wife for the alienation of her affections, the lower court charged that if the separation were caused by the active interference of the parents, the plaintiff was entitled to recover. *Held*, erroneous. *Oakman v. Belden*, 47 Atlantic, 553 (Me., 1900).

This instruction would be too broad in a suit for alienation of affections against a stranger; the better doctrine being that one is not liable unless his statements to the wife were unfounded; or, these being true, his motives are shown to have been dishonest. *Tasker v. Stanley*, 153 Mass. 148 (1891). However, there is authority to the effect that the husband may recover for any active interference by a stranger. *Modisette v. McPike*, 74 Mo. 636 (1881).

When, as in the principal case, a parent of the wife is sued, his interest in the welfare of his child is so far recognized that pure motives and reasonable grounds for his belief will protect him, though the information upon which he acted prove to be erroneous. *Bennett v. Smith*, 21 Barb. 439 (N. Y., 1856); *Holtz v. Dick*, 42 Ohio St. 23 (1884).

It has been held that good faith alone on the part of the parent is a sufficient defence, without regard to the actual circumstances of the case, *Tucker v. Tucker*, 74 Miss. 93, (1896), though the other rule seems better calculated to discourage officious interference.

**GROSS NEGLIGENCE—DEFINITION.**—*Held*, it was error to authorize the jury to find for an injured employé without proof of gross negligence on the part of his superiors. Gross negligence is defined as "the failure to use such care as careless and inattentive persons usually exercise under like circumstances." *Ill. Cent. Ry. v. Coleman*, 59 S. W. 13 (Ky., Nov. 22, 1900).

The definition of gross negligence given by the Court shows the difficulty of an attempt to solemnly give an exact meaning to the term. An undefined degree of aggravated negligence known as gross negligence seems to be recognized in cases arising under contract exemptions of carriers for damage caused by negligence of servants, but the Supreme Court has refused to attempt a definition. *Steamboat "New World" v. King*, 16 How. at p. 474 (1853), *Ry. Co. v. Lockwood*, 17 Wall. at p. 382 (1873). The use of the term in the principal case, implying an exception to the fellow-servant rule, will result, if followed in the jurisdiction, in a breakdown of the rule, which the most recent decisions elsewhere are tending to even strengthen. *C. & E. I. Ry. v. Myers*, 83 Ill. App. 469 (1898). *Malay v. Mount Morris Electric Light Co.*, 41 App. Div. 574 (N. Y. 1899). *Duncan v. A. & P. Roberts Co.*, 194 Pa. St. 563 (1900).

**INSURANCE (MARINE)—EXAMINATION SUBSEQUENT TO LOSS.**—By the terms of the policy no suit was maintainable unless the insured submitted to an examination in case of loss. Defense, that owner refused to state price paid for vessel. Vessel was bought at a receiver's sale, *Held*, under the

circumstances, price paid was not an essential and material fact as a matter of law. *Porter v. Traders' Ins. Co.*, 58 N. E. 527 (N. Y., Nov., 1900).

The interpreted stipulation applied only after loss, and the case is in line with the rule that such stipulations are to be reasonably and liberally construed. *McNally v. Phenix Ins. Co.*, 33 N. E. 475 (N. Y., 1893); *Paltrovitch v. Phenix Ins. Co.*, 37 N. E. 639 (N. Y., 1894); *Sergeant v. Liverpool & London & Globe Ins. Co.*, 49 N. E. 935 (N. Y., 1898); *Solomon vs. Continental Fire Ins. Co.*, 55 N. Y. 279 (N. Y., 1899).

INTERSTATE COMMERCE—TAXATION OF TRANSIENT MERCHANTS—LICENSE.—A traveling salesman of an Illinois firm failed to procure the license required by the City of Cheyenne for all persons selling goods not otherwise taxed. *Held*, this tax is unconstitutional, being in restraint of interstate commerce. *State v. Willingham*, 62 Pac. 797 (Wyoming, Nov., 1900).

The Court decides that the orders given by the purchaser to the canvasser are merely offers which become contracts in Illinois, upon the approval of this firm. *Gill v. Kaufman*, 16 Kans. 571 (1876); *Burbank v. McDuffee*, 65 Me., 135 (1876); *McKindly v. Dunham*, 55 Wis. 515 (1882); *Benjamin, Sales*, §§ 40, 70; *Story, Sales*, § 85. This is purely a question of the agent's authority, real or apparent. Yet it removes the case from that class in which the sale is consummated within the State, and in which the right of the State to tax is upheld; for auction sales, in *Woodruff v. Parham*, 8 Wall. 123 (1868); for peddlers, in *Machine Co. v. Gage*, 100 U. S. 676 (1879). In *Brown v. Maryland*, 12 Wheaton, 419 (1827), MARSHALL, C. J., held that it is unconstitutional to require a license for selling goods coming from other States. This is settled law. *Asher v. Texas*, 128 U. S. 129 (1888); *Brennan v. Titusville*, 153 U. S. 289 (1894); *Ernest v. Mo.*, 156 U. S. 296 (1895).

JURISDICTION OF FEDERAL COURTS—Conceding that the action of a municipal or quasi municipal body was illegal, as held by a State court, is the question whether or not the illegal action of such a body, in the exercise of a power granted to it constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a *bona fide* purchaser—one of general jurisprudence which it would be a dereliction of duty for a federal court to decline to consider or determine for itself, or one in which the federal court is bound by the decision in the State court?

The federal court *held* it was the former, and that as the purchaser was a citizen of another State and had contracted for the bonds before the State decision had declared them void, he had the right under the constitution and laws of the United States to have his contracts interpreted in a court of the United States. *Clapp v. Otoe County*, 104 Fed. 473 (October 9, 1900).

The decisions in the following cases seem to justify this result: *Speer v. Board of County Com'rs of Kearney County, Kan.*, 88 Fed. 749, 760, 762 (1898); *Hartford Fire Ins. Co. v. C. & M. & St. P. Ry. Co.*, 70 Fed. 201, 203 (1895); *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 46 (1896); *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 372-374 (1898).

LIBEL—TRANSMISSION OF DEFAMATORY TELEGRAM—*Held*, a message reading: "A stated that B bought you up in 1896, otherwise you would have been for Bryan," did not manifest the defamatory purpose of the sender, and the telegraph company is not liable for transmitting it. *Nye v. Western Union Tel. Co.*, 104 Fed. 628 (C. C. D., Minn., Nov., 1900).

Though the sender's purpose was in fact defamatory, the Court said the operator was justified in transmitting the telegram because, for all that appeared on its face, it might have been sent merely for the purpose of giving the plaintiff information of the injurious statement made by another. This reasoning cannot be supported. Where libelous matter, which would have been privileged if sent in a sealed letter, is unnecessarily transmitted by telegraph, the privilege is lost. *Williamson v.*

*Freer*, L. R. 9 C. P. 393 (1874). But see *Jeffras v. McKillop*, 4 N. Y. Sup. Ct. Rep. (T. & C.), 578 (1874).

The only authority cited by the Court is opposed to its decision. *Peterson v. Tel. Co.*, 65 Minn. 18, 23 (1896).

**MASTER AND SERVANT—ASSUMPTION OF RISK.**—The defendant's train plunged at night through a bridge, which had just been burned through no fault of the defendant, and a brakeman was killed. For four years past the defendant had discontinued the night inspection of its tracks, and this the brakeman knew. *Held*, it cannot be said, as a matter of law, that he assumed the risk resulting from such lack of inspection. *Maydole et al. v. Denver & R. G. R. Co.*, 62 Pac. 964 (Colo., Nov., 1900).

The doctrine, that where a servant's employment calls for his alert attention he is not expected to bear in mind defects of which he had previous knowledge—if that can be taken as established by the *dictum* in *Snow v. Railroad Co.*, 8 Allen, 441, 450 (1864), and the memorandum report of a *per curiam* decision in *Plank v. Railroad Co.*, 60 N. Y. 607 (1875)—can have no application to the facts of the present case.

The case, however, is within the authority of *Smith v. Baker* (1891), App. Cas. 325 (but see LORD BRAMWELL's dissenting opinion at p. 344), and finds support in the fact that modern cases have declined from the "standard of independence and freedom of contract" set in *Skipph v. Railway Co.*, 9 Ex. 223 (1853); 1 *Beven, Negligence in Law*, 743-4; and in the general tendency to leave to the jury the question what risk the servant assumed. *Boyle v. Const. Co.*, 61 N. Y. Supp. 1043, 63 *Id.*, 1105 (1900); *Fitzgerald v. Paper Co.*, 155 Mass., 155 (1891); *Knight v. Wheel Co.*, 174 Mass., 455 (1899).

**MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.**—The plaintiff, while coaling defendant's engines, was directed to force open a chute which was out of order, and as the result of a defect in the aprons, received injuries. Though plaintiff knew that some of the twelve other chutes had defective aprons, *held*, it was a question for the jury whether he knew, or ought to have known, that this one was defective, and assumed the risk. *Great Northern Ry. Co. v. Kaischke*, 104 Fed. 440 (C. C. A., N. D. Oct., 1900).

Since the essential facts determining the risk assumed were in dispute, the case was for the jury. *Clarke v. Holmes*, 7 H. & N. 937, 944 (1862); Wood on Master and Servant, sec. 388.

Though the plaintiff knew in a general way that the machinery was out of order, he cannot be said to have contemplated this risk so as to assume it, for the particular defect which made it dangerous was not obvious, and he acted under pressure. *Huddleston v. Machine Shop*, 16 Mass., 282 (1871); *Austin v. Railroad Co.*, 172 Mass. 484 (1898); *Ry. Co. v. Price*, 97 Fed. 423, 431 (1899). But it is conceived that, if the danger had been obvious, the peremptory command of defendant's foreman could not have relieved plaintiff of the assumption of risk. *Deemers v. Deering*, 93 Me. 272, 280 (1899).

**PARTNERSHIP—ENTITY THEORY IN BANKRUPTCY.**—Where one of two partners is solvent and the other is not, *Held*, the firm is solvent and the solvent partner may prove *pro rata* as a member of the firm with the individual creditors of the insolvent copartner. *In re Stevens*, 104 Fed. 323 (Dis. Ct., D. of Vt., Dec. 4, 1900).

This case, like others under the recent Bankruptcy Act of 1898, is in line with decisions tending to establish the separate existence of the firm as an entity distinct from the individual partners.

**PROPERTY—HIGHWAY EASEMENT.**—Defendant proposed to construct an electric trolley railway on a country highway without the consent of the plaintiff who was an owner of land to the middle of the road. Injunction refused. *Ehret v. Camden & T. R. Co.*, 47 Atl. 562 (N. J., Nov. 27, 1900).

The law being settled in New Jersey that a trolley road in a city does not entitle to compensation [*Roebling v. Railway Co.*, 58 N. J. L. 666 (1896)], the Court refused to follow *Zehren v. Light Co.*, 99 Wis. 83 (1898), and *Pennsylvania R. Co. v. Montgomery Ry. Co.*, 167 Pa. St. 62 (1895), which held that an electric road in a country highway was different in its purpose and effect from an electric road in a street, and imposed an additional servitude on the highway. The structure to be built on the highway was to serve the public within the township in exactly the same manner as within a municipal corporation. Its design was to serve the primary purposes of a highway.

In New York the rule is different. The building of a horse car line, even in a city street, is held to amount to the imposition of a new burden on the adjoining land. *Craig v. Rochester R. R. Co.*, 39 N. Y. 404 (1868).

**PROPERTY—PERCOLATING WATER—ABSTRACTION FROM ANOTHER'S LAND—MUNICIPAL WATER-WORKS.**—The City of New York, by means of pumps erected in wells on its own property, abstracted subsurface water from the surrounding territory, thus rendering plaintiff's land unfit for agricultural purposes. No complaint is made of interference with any well or surface stream. *Held*, that the municipal corporation is liable as for trespass. *Forbell v. City of New York*, 164 N. Y. 522 (Nov. 22, 1900). SEE NOTES.

**REMEDIES—RETROSPECTIVE LAWS.**—The right of action of a single creditor against any stockholder for the amount of his judgment, provided by a Kansas Statute of 1868, is not superseded as to contracts made while the statute is in force by the remedy provided by the Corporation Act (Laws Kansas, 1898, C. 10), which contemplates the appointment of a receiver, who shall enforce the stockholders' liability for the benefit of *all* creditors alike.

The right of action has become a part of the contract, which cannot be impaired. *Webster v. Bowers*, 104 Fed. Rep. 627 (October 16, 1900).

The conclusion of the Court is in accordance with the weight of authority. The cases seem to hold that any statute which changes or affects the remedy merely and does not destroy or impair any vested right—which does not destroy any existing right of action or defence, or create any new ground of action or defence, or imposes a new duty or creates a new obligation to transactions or considerations already past—is not a retrospective law, even though in changing or affecting the remedy the rights of parties may be incidentally affected thereby. *Dash v. Van-leek*, 7 Johns. 477 (1811); *Society v. Wheeler*, 5 Gall. 105 (1814); *Paschal v. Perez*, 7 Tex. 348 (1851); *Learey v. Stubbs*, 12 Ga. 437 (1853); *Rich v. Flanders*, 39 N. H. 304 (1859); *Henschell v. Schmidts*, 50 Mo. 454 (1872); *Bird v. Keller*, 77 Me. 270 (1885).

**REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATION.**—Defendant, originally incorporated in Illinois, subsequently became a domestic corporation in Nebraska. A citizen of Nebraska sued the corporation in Nebraska courts. *Held*, defendant may remove. Its citizenship remained that of the state of its original creation. *Walters v. C. B. & Q. R. R. Co.*, 104 Fed. 377 (Cir. Ct., D. of Neb., Oct. 3, 1900). SEE NOTES.

**RES JUDICATA.**—An action by the Territory of New Mexico to recover taxes on a railroad's right of way and on improvements over private property, after previous suits for the recovery of taxes generally, based upon the same assessments, had been decided adversely to the Territory. *Held*, that the matter is *res judicata*, because it might have been offered under the pleadings in the former cases. *Territory v. Santa Fe Pac. R. Co.*, 62 Pac. 985 (N. M., August, 1900).

This decision is placed upon *Cromwell v. Sac. Co.*, 94 U. S. 351 (1876), and accords with what was said by BREWER, J., and *Pattison v. Wold*, 33 Fed. 791 (Minn., 1888). The English rule gives the doctrine of *res judicata* much broader scope, applying it not only to all matters upon which the Court actually passed judgment, but to "every point

which belonged properly to the subject of litigation." *Henderson v. Henderson*, 3 Hare, 100 (1843); *Bailey v. Bailey*, 115 Ill. 551 (1886) and *Martin v. Roney*, 41 Ohio St. 141 (1884), *accord*. In *Griffin v. L. I. R.R. Co.*, 102 N. Y. 452 (1886), the rule is stated as embracing "all matters which the parties might have litigated and decided as incident to or essentially connected with the subject-matter within the purview of the original action, either as a claim or a defense." *Pray v. Hegeman*, 98 N. Y. 351 (1885).

But MILLER, J., dissenting, in *Aurora City v. West*, 7 Wall, 106 (1868), says: "When a former judgment is relied on, it must appear by the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." *Stannard v. Hubbell*, 123 N. Y. 520 (1890); *Cavanaugh v. Buehler*, 120 Pa. St. 441 (1888).

**SURETYSHIP—INSURANCE—BANKRUPTCY.**—Defendant insured plaintiff against liability for damages for personal injuries. B was injured in the service of plaintiff, and got judgment. A clause of the insurance contract provided that defendant was to indemnify plaintiff only for judgments actually paid up by plaintiff. Plaintiff's trustee in bankruptcy applies to the equity court for a decree ordering payment of the whole judgment by the insurance company direct to B. *Held*, By the insurance agreement, the insurance company became principal debtor. Prayer is granted on the theory of the surety's right to compel payment by the principal debtor. *Beacon Lamp Co. et al. v. Travellers' Ins. Co. et al.*, 47 Atl. 579 (N. J. Nov. 7, 1900).

The Court based its decision on the analogy between this case and that of a mortgagor conveying land to a grantee, the grantee agreeing to pay the mortgagee, thus becoming principal debtor, with the grantor as surety *Klapworth v. Dressler*, 13 N. J. Eq. 62 (1860). The analogy seems hardly valid. For here the insurance company stipulated against liability to any person other than the plaintiff. How, then, did the defendant become principal debtor to B as creditor, with the plaintiff as surety? It is certainly doubtful whether the court would apply its theory of suretyship to the extent of allowing B to sue the insurance company directly if the insured employer were solvent. Yet why has not B this right if the defendant is his principal debtor? This decision, however, suggests a practical mode of administering insolvent estates. To hold the defendant liable to the trustee in bankruptcy, *pari passu*, for each dividend paid by the trustee to B, would cause interminable litigation. The course adopted, while very favorable to B as well as to the other creditors of the plaintiff, does not seem inequitable as regards the defendant, for it simply prevents his profiting from the plaintiff's bankruptcy. The valid basis of the decision seems to be expeditious administration rather than any principle of suretyship law. But no doubt when subsequent cases arise the court will treat a similar insurance contract as made in the light of this decision, and the company will be held liable on the ground of voluntary assumption of such liability. The decision, therefore, would seem to have far-reaching effects in insurance law.

**TORTS—NEGLIGENCE—INJURIES FROM FRIGHT.**—Plaintiff was permitted, without warning from defendant's gatekeeper, to drive upon a railroad crossing in the face of an approaching train. The gates were then closed and the plaintiff kept inside while the train passed. He alleged paralysis as the result of fright. *Held*, the complaint was demurrable. *Ward v. West Jersey & S. R. R. Co.*, 47 Atl. 561 (N. J., Nov. 12, 1900).

This decision settles the rule in New Jersey in accord with the cases in Massachusetts, New York and elsewhere, which hold that physical suffering resulting from mere fright affords no ground of action. *Spade v. Railroad Co.*, 168 Mass. 287 (1897); *Mitchell v. Railway Co.*, 151 N. Y. 107 (1896). This rule is sound considered from the point of view of public policy. As was said in *Mitchell v. Railway*: "If the right of recovery in this class of cases should be once established, it would naturally result

in a flood of litigation in cases where the injury complained of may be easily feigned." But the rule cannot be supported save as an arbitrary mode of preventing litigation. The proposition that "if mere fright cannot form the basis of an action, it is obvious no recovery can be had for injuries resulting therefrom." *Mitchell v. Railway* is illogical and unsupported by authority. It is well settled that if owing to reasonable fright a man seeks to escape from peril and is hurt, though he could safely have remained where he was, he may recover damages. *Jones v. Boyce*, 1 Starkie, 493 (1816); *Twomley v. Central Park Ry. Co.*, 69 N. Y. 158 (1877). Nor can it be said plausibly that "physical suffering is never the probable or natural consequence of fright, in the case of a person of ordinary physical and mental vigor." *Ward v. R. R. Co.* (*supra*). So far as the decision by the New Jersey Court is based on this theory it is open to criticism. See *Bell v. Great Northern Ry.*, L. R. Ir., 26 Exch. 438 (1890), where the plaintiff recovered.

TRESPASS—CUTTING TREES—MEASURE OF DAMAGES.—Suit for cutting immature and matured timber not included in contract. *Held*, that damages are not limited to value of timber so cut, but that injury to the freehold is to be included even in case of mature timber. The measure is the difference between value of land with such wood cut as contract authorized and value of land after all the cutting. *Disbrow v. Westchester Hardwood Co.*, 58 N. E. 519 (N. Y., 1900).

This decision emphasizes the rule of *Dwight v. Ry. Co.*, 132 N. Y. 199 (1892). This measure is generally recognized where growing timber is cut, but not in case of full grown timber. 3 *Sedgwick on Damages*, 45, and cases there cited; *Wallace v. Goodall*, 18 N. H. 439 (1846); *Argotsinger v. Vines*, 82 N. Y. 308 (1880).

## BOOK REVIEWS.

**QUESTIONS AND ANSWERS ON TWENTY-FIVE OF THE MOST IMPORTANT LEGAL SUBJECTS.**—Second Edition. By Wilber A. Owen, LL. M., of the Toledo, Ohio, bar. St. Paul, Minnesota, 1900. West Publishing Company. pp. v, 613.

Mr. Owen has adopted the plan of choosing one book (usually one of the Horn book series) on each topic, and drawing his answers chiefly from that; where he alters the definitions he has almost always secured greater clearness and accuracy. It is, of course, impossible in a work of this kind which is intended for general use in all the States, to treat subjects with reference to statutory law, and while the author tries to give proper warnings, it is necessary for a student to bear this limitation in mind, if he is not to be misled. Upon the subjects which are governed by commercial law and custom, or where the common law is generally unaltered, a brief, clear review of the leading principles and more important definitions is given, which should be of much assistance to a person preparing for examination, and the method adopted of following pretty closely one book on each topic renders it easy to extend the review if desired.

The subjects which may be especially mentioned are Sales, Negotiable Instruments, Suretyship, Partnership and Corporations. Upon the last topic there are frequent references to Clark and Beach, and occasional ones to Thompson and Morawetz. It is difficult to cover satisfactorily the ground in Contracts in little over one hundred questions, but good judgment is shown in their choice. On the subjects of Real Property, Trusts (treated by the author briefly under the general head of equity) and Pleading, civil and criminal, the book is of less value to the New York student. For the kind of examination in vogue here a few years ago, involving many calls for definitions, it furnishes a remarkably good eleventh hour review, and even for the more recent kind, consisting of problems to be solved, it is of use to get a few leading principles and definitions clearly in the mind.

**THE LAW IN ITS RELATIONS TO PHYSICIANS.**—By Arthur W. Taylor, LL. B., of the New York Bar. New York, 1900. D. Appleton & Co. pp. iv, 550.

This book was written for the medical profession. Its object is to inform physicians of their rights and obligations, and to elucidate and illustrate, in some degree, the legal principles upon which these rights and obligations depend. This knowledge is scattered throughout the innumerable volumes of legal reports, and is, of course, inaccessible to the medical profession, and the author in collecting and arranging cases, illustrating this special field of the law, has per-



formed a valuable service for the medical profession. The statutes regulating the right to practice medicine in the various states are given and explained. The contract relations between the physician and patient and the liability of third parties are carefully pointed out and illustrated by cases.

The chapter dealing with the Civil and Criminal liability of physicians for malpractice is particularly useful. The style and arrangement are excellent, and the author's comments are so clear that the intelligent layman should have no difficulty in understanding what the law is, and the reasons upon which it is based. The author's plan of illustrating the legal principles by quoting freely from the well-considered opinions of Judges in leading and typical cases, instead of from text books, is particularly to be commended. The author's object as set forth in the preface has been admirably carried out, and medical men will find the work an exceedingly valuable addition to their libraries.

AMERICAN LAW. A Treatise on the Jurisprudence, Constitution and Laws of the United States. By James De Witt Andrews. Chicago: Callaghan & Company. 1900. pp. cxii, 1245.

"America's Greatest Institutional Law Book."—PUBLISHER.

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"A great work and undoubtedly placed upon a true philosophical basis."—JUSTICE COURT OF APPEALS AND PROFESSOR OF LAW.

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"In respect of its style the work will stand among the first legal classics of England and America."—LAW REVIEW.

"Every elementary topic in the legal field is adequately expounded. The whole work is an analytical outline of the law, so well arranged, so thoroughly done, so excellently proportioned, that it is but just to speak of it as a splendid specimen of what may be called legal literary architecture."—PROFESSOR OF LAW, IN LEGAL NEWS.

It is an ungrateful task which devolves upon the belated reviewer of this much-lauded work, and the publisher, who has had his head turned by the indiscriminate praise with which it has been received, may well doubt whether any capacity for judgment really exists in the profession to which it is addressed. It would be impertinent to inquire too closely into the mental operations of the jurists and statesmen who have committed themselves thus unreservedly to an indorsement of this book. For, of a score or more of reviews which have come under the observation of the writer of this notice, only one indicates that that confusion of judgment was invited which, according to Sidney Smith, results from the mischievous practice of reading a book before reviewing it. It is a charitable as well as the only reasonable explanation of the treatment which this work has

received at the hands of "indolent reviewers" and a too indulgent bench and bar, that it was "passed" on its size and appraised on its pretensions.

Not that this impressive volume of 1,200 odd pages is without certain conspicuous merits. It shows varied and extensive reading, a serious and comprehensive purpose and an appalling industry. Indeed, the work makes a formidable impression of learning, which is not entirely dissipated by a closer acquaintance with its contents. It is a veritable storehouse of legal maxims and of sage observations on the law and its principles and tendencies. Furthermore, it is the first serious attempt which has been made on this side of the Atlantic at a complete classification of our legal system; and this attempt, notwithstanding grave defects in plan and execution, must be conceded to rank as a real achievement. It is an extraordinary example of analysis and criticism, reminding one of Austin in the refinement of its reasoning and the minuteness of its observation, as, alas! in its prolixity and too frequent obscurity. Indeed, if one were at liberty to deal with the book at first hand, to ignore its avowed purposes and the extravagant claims asserted for it by its publisher and friends, we might render it the tribute of sincere, though qualified, praise. Regarded as a discourse on *method*, as a treatise on legal analysis, it is likely to take a permanent place in the small list of works of that character which the busy Genius of Anglo-American law has found time to produce.

But we are not at liberty to ignore the pretensions of the book. It is the first of the canons of criticism that a work shall in some sort serve the purposes of its creation, or stand condemned of sterility and failure. It is this, the major excommunication, which we pronounce on "The Blackstone of America." If we spare it the bitter *anathema*, it is only for the saving grace of the swollen discourse on legal method, to which reference has been made. But, for the remaining thousand pages, there is no grace to save them. They are condemned from the beginning.

*"Monstrum horrendum informe ingens,  
Cui lumen ademptum."*

Conceive of an "institutional" work for students, a commentary on American law, which devotes 150 pages to a minute examination of principles of legal classification, consumes 450 more in an exposition of the governmental machinery under which we live, and then undertakes to deal with the whole body of our private law, substantive and adjective, in 600 pages more! in which only 68 pages can be spared for Real Property, 50 pages for the whole length and breadth of Equity Jurisdiction and 15 pages for Evidence! in which the law of Mortgages is expounded in two pages, the subject of Easements treated in one, and Torts (*stat nominis umbra*) appears only as a title in the index! The shrinking of this *magnum opus* from the extraordinary amplitude and fullness of its beginning to its concluding grand division, Part IV., devoted to The Law of Crimes—in 2½ pages!—irresistibly invites the phrase

"petered out" as the only fit term by which to describe the process. The exigencies of the publishing trade, appealed to on page 1149 as the author's excuse for this lamentable lack of proportion, affords no excuse, nor even mitigation of an offense which defeats the avowed purpose of the book, but is a confession of failure. That the "desirability" of compressing the work into a single volume should "outweigh" the "necessity" of providing at least "an elementary exposition" of the principal topics of our law in "America's greatest institutional law book," may be an obvious proposition to a publisher (though the writer is happy to say that he knows some law book publishers whose surprise at the suggestion would be equal to his own), but that the responsible author should deliberately sacrifice his work on that high commercial altar, would not be believed if we had not his word for the fact. It is not recorded of Blackstone and Kent and Story and Greenleaf (whose writings this newest institutional work is destined to supersede) that they wrote their great treatises with the fear of the law publisher or of the one-volume law student before their eyes. The plain fact is, the author has been swamped by his materials. Lacking a due sense of proportion, and not having his law well in hand, he laid out his work on a ten-volume scale and then mutilated it to suit the exigencies of a one-volume demand.

Frankly, we do not believe that there is any demand for an "institutional" work of the kind attempted by our author. The American Blackstone is as much of an anachronism as would be a 20th century Lord Bacon, who should make all modern science his province. That there is room for a systematic outline of American law, a draft code rather than a *corpus juris*, may be conceded, without admitting that it would be of any considerable value either to the law student or to the general practitioner, for whom Professor Andrews' work is intended. But we have preferred to rest our criticism on the quality of the book before us, judging it by its own promise and not by any ideal standard, and we have condemned it not because it undertakes a work which we do not deem worth doing, but because the work which it has undertaken is badly done.

We have left ourselves no room to speak at length of the author's literary style, which, apart from a certain felicity of definition and condensed statement, displays little animation, is usually ponderous and sometimes obscure. At its best it is not easy reading—a particular in which it differs conspicuously from its great counterpart. This is due mainly, perhaps, to the discursive and confused manner in which the argument is presented. It is probably not necessary that a writer on method should himself be methodical, but his treatise would be vastly more convincing if it exemplified his principles. The law of the book is for the most part accurate enough, but errors due to partial and imperfect knowledge—as the curious statement that "estates tail are not allowed in the United States" (p. 974), and the unqualified assertion (p. 1003) that the mortgagor is a mere tenant at will after condition broken—are common enough to give one pause. The author has made

superabundant use of his extensive acquaintance with the late Judge Wilson's works, lately edited by him. Indeed, regarded as a commentary on Wilson, the treatise on American law leaves little to be desired. That it will serve any other useful purpose we cannot believe. That any considerable number of people, law students or lawyers, should actually read it, is inconceivable. One cannot but regret the enormous labor that has gone to make this enormous book. The writer of this notice confesses to a strong temptation to paraphrase Byron's eulogy of Southey's "Thalaba," and to say, in the vein of the indulgent critics quoted at the head of this article, that Andrews' American Law will be read when Blackstone and Kent are forgotten—and not till then. But he sternly refuses to yield to the temptation. He doesn't believe that it will.

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Acknowledged :

**CHIEF JUSTICE MARSHALL.** An oration. By the Hon. Joseph Story. Reprinted by the Lawyers' Co-operative Publishing Association out of compliment to the American Bar Association and in honor of "John Marshall Day," February 4, 1901.

**THE DIFFICULTIES OF OBTAINING JUSTICE.** By Oscar Reuter, J. U. D., of the Denver, Colorado, Bar.

Reviews to follow :

**THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW.** By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

**ELEMENTS OF JURISPRUDENCE.** By Thomas Erskine Holland, D. C. L. Ninth Edition. New York: Oxford University Press, American Branch. 1900. pp. xvi, 430.

**CLERK'S ASSISTANT.** By Austin Abbott, LL. D. Revised Edition. By Clarence F. Birdseye. New York: Baker Voorhis & Co. 1900. pp. x, 1091.

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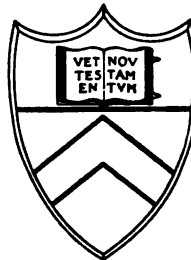
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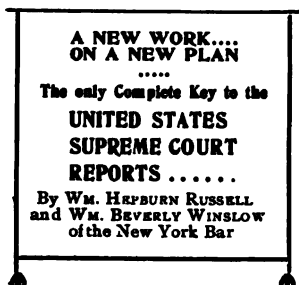
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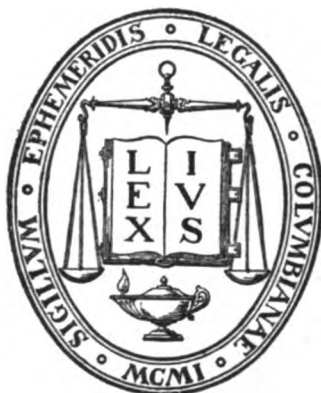
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## THE LAW OF PRIZE AS AFFECTED BY DECISIONS UPON CAPTURES MADE DURING THE LATE WAR BETWEEN SPAIN AND THE UNITED STATES.\*

THE Constitution of the United States of America was framed at a time when the influence of Montesquieu was commanding. The theory of the separation of the three Departments of Government, Executive, Legislative and Judicial, is one of the points most insisted upon by the great French jurist. The United States Constitution provides for such a separation. Some of the features of this Constitution have been modified by the stress of unexpected situations that have developed in the history of the Republic. But the theory before mentioned has been closely adhered to. Neither in the central Government of the United States, nor in those of the separate States composing the Federation, is there any such thing as a responsible or parliamentary government. And in all the jurisdictions, whether of the Federal or State Courts, the right and the duty of a court to annul a statute which has passed all the forms of legislation, on the ground that it is in violation of the fundamental law or Constitution of the country is well recognized, and has been from the foundation of the Government. I am far from suggesting that this absolute independence of the judiciary is objectionable. At the same

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\*A paper read before the Rouen Conference of the International Law Association, 1900.

time it must be admitted that it sometimes puts the Executive in a trying position. It is quite possible, and has indeed sometimes happened, that in the administration of foreign relations the Executive has determined upon a certain line of policy, which the courts in cases coming before them for adjudication have refused to enforce. This has been notably true in questions arising in reference to the rights of neutrals and the law of prize and of blockade. The policy of the Executive in dealing with these questions has been far more liberal than one would suppose from reading the decisions of the courts of justice. This is in large measure to be attributed to the fact that the law of the United States has for its foundation the law of England, and that the decisions of the English courts have always been cited with great respect in the tribunals of America. Indeed the jurisprudence of the United States is based upon English authorities to a much greater extent than any one would suppose possible, who had not been a careful student of American law.

During the struggle between Napoleon and the older Governments of Europe, including that of Great Britain, the extent of the rights of neutrals became the subject of frequent discussion in prize courts. The necessities of the conflict compelled both sides to take ground in reference to foreign trade, which nothing but necessity could justify, or excuse. The policy of the British Government on this subject as it existed at the time found expression, not only in the celebrated Orders in Council, but in the judgments of the British prize courts. The Kingdom of Great Britain was fortunate in having for many years as the Judge of the Court of Admiralty Sir William Scott, afterwards Lord Stowell. He was a man of extensive learning, of extraordinary vigor and acuteness of intellect, and the luminous style of his judgments makes them models of judicial expression. These judgments were read in America, and became the foundation of the law of prize as administered in the courts of the United States. These courts during the Civil War between the Northern and Southern States of the Union realized the necessity of enforcing the law of blockade with the utmost strictness. The decisions of Lord Stowell were adopted as precedents.



During the late war between the United States and Spain, counsel who were entrusted with the conduct of prize cases before the Supreme Court of the United States found themselves confronted with a body of decisions which on the whole were far more favorable to the exercise of belligerent rights than to the protection of the rights of neutrals. The policy of the Executive was more liberal. This was shown at the outset of the war by the declared adhesion to the declaration of Paris. The reason given by the American Government in 1856 for its refusal at that time to adhere to the Declaration of Paris, was the fact that this failed to prohibit the capture of private property at sea. At the outset of the Spanish War, the Government of Spain also declared its adhesion to the Declaration of Paris, and although it reserved the right to commission privateers, yet it did not exercise this right. It may fairly be said that the Declaration of Paris has by universal consent become a part of the law of nations.

The action of the President in regard to the Declaration of Paris is thus stated in his Annual Message to Congress, transmitted December, 1898 (page 7):

"In further fulfillment of international duty I issued April 26, 1898, a proclamation announcing the treatment proposed to be accorded to vessels and their cargoes as to blockade, contraband, the exercise of the right of search, and the immunity of neutral flags and neutral goods under enemy's flag. A similar proclamation was made by the Spanish Government. In the conduct of hostilities the rules of the Declaration of Paris, including abstention from resort to privateering, have accordingly been observed by both belligerents, although neither was a party to that declaration."

It is the opinion of two writers on International Law, of the highest rank, Pistoye and Duverdy (*des Prises*, Vol. 1, page 375), that by the modern law, in consequence of the Declaration of Paris, a vessel must be notified to depart from before the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council, during the Napoleonic wars, which is now given up by that country.

"The old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is

now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."\*

In the opening words of the President's proclamation of April 26th, 1898, reciting the fact of war with Spain, it was declared to be "Desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice" (30 Stat., p. 1770).

This effect of the Declaration of Paris is only an affirmation of the original American rule, which the stress of the war with Napoleon led Lord Stowell to reject. The stress of the war with the South induced our Courts, at that time, to follow to some extent the English rule. Our Government had not then declared its adhesion to the Declaration of Paris. But the old American rule, as laid down by the Executive, was in accordance with this statement of Pistoye and Duverdy.

Wheaton on Captures (pp. 342, 343) quotes a letter from the British Admiralty office January 5, 1804 (by authority Secretary State Foreign Affairs, p. 342). In this it is stated that the British Government "sent orders to Commodore Hood not to consider any blockade of these islands as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them."

This was approved by the Government of the United States (*Ibid.*, 353, Dispatch Mr. Pinkney to Marquis Wellesley).

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\* "On considerait comme une violation de blocus le fait de se diriger vers des lieux qui étaient bloqués. Aujourd'hui il n'en saurait être même, car des neutres ne sont obligés de respecter que les blocus effectifs; or, il peut se faire qu'un blocus notifié officiellement ne soit pas effectif, il peut même se faire qu'un blocus, qu'a été établi avec des forces suffisantes ait cessé d'exister; les neutres sont dans leur droit de se diriger vers un port bloqué pour voir si le blocus subsiste toujours; ils ne sont coupables que lorsque, le blocus existant, ils cherchent à le violer."

In this dispatch our Minister to the Court of St. James adds (page 353):

"No comment can add to the value of that manly and perspicuous exposition of the law of blockade, and made by England herself, in maintenance of rules which have been respected and upheld in all seasons and on all occasions by the Government of the United States."

And in another dispatch the American Minister maintains (pages 354, 355):

"That a vessel cleared or bound to a blockaded port shall not be considered as violating in any manner the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it."

Some of the reasons for the historic policy of the United States are thus stated by Wharton (*Digest of International Law*, Vol. 3, Sect. 405, page 659):

"The policy of the United States is to maintain neutral immunities for the following reasons: (1) The probabilities of war are far less with us than with the great European States. From the nature of things, points of friction between the United States and foreign nations are comparatively few. We have an ocean between us and the great armed camps of the Old World; and while there are innumerable questions as to which one European State may come into collision with another, the only points as to which we would be likely to come into collision with a European State are those concerned in the maintenance of neutral rights. It was to maintain such rights that we went to war in 1812; and except, during the abnormal and exceptional spasm of the late Civil War, our national life has heretofore been the life of a neutral and vindicator of neutral rights; and neutrality when our system took shape was arduous. The world was absorbed in the tremendous contest between France on the one side and England with her allies on the other. At times we were the only civilized power that remained neutral. Threats and blandishments were used, both by France and England, to drive us from our position, but that position was not only defined and defended, under General Washington's administration in papers so able and just as to be the basis of all future proclamations of neutrality, but was adhered to, though necessitating a war for its defense. Our international attitude is, from the nature of things, that of neutrality; and of the rights of neutrals we are from the necessity of the case the peculiar champions. (2) Although the richest country in the world, our traditions and temper are adverse to large naval and military establishments. (3)

The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the Civil War; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small; it would be hard to convince the people of the United States that the immense and exhausting armaments of the great European States are not in part caused by the assigning of undue power to belligerents, and that one of the best ways of inducing a gradual lessening of these armaments would be the reduction of these powers."

In the preface to the same work (2d Ed., Vol. 1) Wharton does no more than justice to the traditional policy of the United States upon the subject.

"In Mr. Fillmore's second annual message, in a passage understood to have been furnished by Mr. Webster, then Secretary of State, we were told that 'one of the most eminent of British statesmen said in Parliament, while a minister of the Crown, "that if he wished for a guide in a system of neutrality he should take that laid down by America in the days of Washington and the secretaryship of Jefferson"' ; and we see, in fact, that the act of Congress of 1818 was followed the succeeding year by an act of the Parliament of England substantially the same in its general provisions."

"The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

We have now to compare with these statements as to the policy adopted by the Executive of the United States, the decisions of the United States Supreme Court made during the late war.

*Sufficiency of Blockade.*—In the case of the *Olinde Rodriguez*<sup>1</sup> a question arose as to the sufficiency of the blockade at the port of San Juan. The steamer *Olinde Rodriguez* was captured by the cruiser *Yosemite*. She was a French

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<sup>1</sup> Volume 174, United States Reports, page 510.

mail steamer, and the port of San Juan was one of her regular ports of call. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. After this proclamation the steamer entered the port, came out of it, was signalled by the *Yosemite*, and had an official warning of the blockade of that port entered in her log. On a subsequent voyage she was captured by the cruiser *New Orleans*, on the ground that she was then attempting to run the blockade. The judge of the court of first instance held that the blockade of San Juan was not an effective blockade, and relied upon earlier cases, in which it was held that the presence of one blockading vessel off a port was not sufficient to make the blockade effective. On this point he was overruled by the Supreme Court of the United States.

Mr. Chief Justice Fuller, delivering the opinion of the Court, says:<sup>1</sup>

"The fourth maxim of the Declaration of Paris (April 16, 1856) was: 'Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' Manifestly, this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockade where extensive coasts were put under blockade by proclamation, without the presence of any force, or an adequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances."

"This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus:

"'The Declaration of Paris was, in truth, directed against what were once termed 'paper blockades,' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man of-war in the offing or the like. The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St.

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<sup>1</sup> Vol. 174, United States Reports, 513.

James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that declaration. Hall's Int. Law, Sect. 260, p. 730. note.'

"The quotations from the Parliamentary debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined. "Force sufficient to prevent the ports being approached without exposure to a certain danger.'

"Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous.

"Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent."

The Court held that the question of effectiveness was not to be controlled by the number of blockading ships. The opinion refers to the treaty between France and Denmark in 1742, to the treaty of 1760 between Holland and the two Sicilies, and to the treaty between Prussia and Denmark of 1818. In all these treaties it was stipulated that the presence of more than one belligerent vessel should be essential to the validity of a blockade. But the Court holds that such particular agreements between nations are not of special importance in fixing general international law, and concludes:

"That if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective."

The *Yosemite*, the steamer which first maintained that blockade was an American merchant ship converted into an auxiliary cruiser. Her maximum speed was 15½ knots. She mounted eighteen guns, the largest of which was 5-inch, their greatest range 3½ miles. The *New Orleans* was

an armored cruiser, whose maximum speed was 22 knots. She mounted twenty-four guns, the largest of which were 6-inch, and their maximum range was  $5\frac{1}{2}$  nautical miles. Moving at maximum speed, she could cover in ten minutes any point in a circle 19 miles in diameter, and her electric searchlight could sweep the sea at night for 10 miles distant. Obviously, a blockade by such a vessel was sufficient where the entrance to the blockaded port was by one channel only. On the other hand, it is quite easy to see that a port might have several channels separated by a distance of 10 or more miles, and that in such a case a blockade by one cruiser only would not be sufficient.

*Intent to Run a Blockade.*—In the same case, the Court held that there was no sufficient proof that the steamer in question intended to run the blockade. It was shown that her consignee had requested the captain to stop at San Juan and take fifty first-class passengers. This was a temptation to enter there. But the Court held that the uncontradicted evidence from the ship's officers, to the effect that there was no intention to run the blockade of the port, was controlling. In dealing with this question of evidence the Court says (page 535):

“The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned.”

On the other hand, the Court held that the movements of the steamer were sufficiently suspicious to warrant a belief on the part of the captors that she was endeavoring to draw them within range of the shore batteries, under cover of which she could safely enter, and on this ground awarded restitution of the prize without damages, and imposed upon the owner payment of “the costs and expenses incident to her custody and preservation.”

In the case of the *Newfoundland*<sup>1</sup>, the Court also had to deal with the question of actual intent to run the blockade. The vessel in that case was captured near the port of Havana. There also the allegation of the captors was that the vessel was loitering near a blockaded port, and manœuvring to get under the protection of the shore batteries.

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<sup>1</sup> 176 United States Reports, 97.

There were the additional circumstances of suspicion that the vessel had been warned off one port in the Island of Cuba, and was sailing westward, ostensibly with the view of passing around the western end of the Island, whereas her nearest route to her port of destination would have been to the eastward, passing around the eastern end of the Island. This, however, was held not to be controlling.

In short, in dealing with evidence of actual intent to run a blockade, the Supreme Court of the United States has shown liberality towards neutrals, and has exacted from the captors very decisive proof of intent to violate the blockade.

On the other hand, in the case of the *Adula*<sup>1</sup>, the Court followed the most strict of the decisions during the Napoleonic wars and the Civil War of the United States. There was no serious question in this case as to the intent of the *Adula*. She was a British ship, chartered by a Cuban to go from Kingston, in the Island of Jamaica, to Guantanamo and Santiago, in the Island of Cuba. She went in ballast, with no cargo, and for the purpose of taking off refugees. She had been engaged in this business on several prior voyages, with the consent of the United States Government. The Court held in the first place, that to constitute a valid blockade it was not necessary that any official notice of the blockade should have been given. Neither Guantanamo nor Santiago were included in the proclamation of the President, declaring what ports in the Island of Cuba should be considered as blockaded. But the Court held that it was competent for the commander of the squadron off these ports to maintain a blockade there, and that notice of a blockade *de facto* was sufficient to charge a ship sailing for such a port with the intent to violate it. It appeared that the *Adula*, which was a slow vessel, having a speed of only eight knots, was instructed to request permission to enter these ports, and the speed of the vessels maintaining the blockade was such that any attempt on her part to run the blockade would have been futile. No attempt was made. Permission was in fact requested, and indeed the *Adula* was at anchor when she was seized.

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<sup>1</sup> 176 United States Reports, 361.



Nevertheless, the Court adhered to the letter of earlier decisions, that the mere fact of sailing for a port known to be blockaded subjects the vessel so sailing to condemnation, and that it is unlawful even to ask permission to enter. It was further held that the case was not altered by the fact that the port of Guantanamo, at the time of the capture, was and had been for over two weeks in the exclusive possession of the United States naval and military authorities. The city of Guantanamo was inland, on a small stream, not navigable, and distant several miles from the bay. In this latter case, four Justices of the Supreme Court dissented, and the decision was made, therefore, by a majority of but one Judge. It is also to be observed that on the point last mentioned the decision was at variance with that of the commission created by the treaty of Washington (1871) to dispose of the matters in difference between the United States and Great Britain, growing out of the Civil War in the United States (1861-1865).

That commission, which was an international court, were of the opinion that the law was otherwise. The Commission was composed of one Commissioner appointed by Great Britain, one appointed by the United States, and an Italian Commissioner (Count Corti) agreed upon by both parties. A claim was presented to it by a British subject for cargo seized upon the *Circassian*,<sup>1</sup> which had sailed for the port of New Orleans before that port was captured by the Federal troops. During the voyage the capture took place. A majority of the Supreme Court had held that inasmuch as the country in the vicinity of New Orleans, forming part of the port, was still in the possession of the Confederates, the blockade could not be considered as having been raised. To use the language of the Court (2 Wallace Reports, 141):

“The rebel Mayor and Council were deposed. There was no armed resistance, but the city was bitterly disaffected, and was kept in order only by severe military discipline, and the rebel army was still organized in the vicinity.”

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<sup>1</sup>The report of the agent of the United States, Robert S. Hale, upon this case, is contained in Volume 6 of Papers Relating to Treaty of Washington, pages 141 to 148.

A majority of the Commission were of the opinion that the decision of the majority of the Supreme Court in this case was erroneous, and awarded damages to the owner of the *Circassian* for the capture. It is plain, from the dissenting opinion of Commissioner Frazer, that his dissent was based upon the proposition that the port of New Orleans was not in possession of the United States at the time the *Circassian* was captured, although the city was. He substantially admits that the *Circassian* would not have been subject to capture if the whole port had been in possession of the United States. This was a much stronger case for the captors than that of the *Adula*. There was no question that it was the intent of the *Circassian* when she sailed to run the blockade, if she could; whereas it was equally clear that it was never the intention of the *Adula* to run the blockade.

This case is a notable illustration of what has been already stated, that the United States Supreme Court has often felt itself constrained by previous decisions to decide cases of a public character pending before them in a manner at variance with the declared policy of the Executive.

The special message of the President sent to Congress April 11, 1898, expresses the intention of the United States Government in undertaking to intervene in Cuba.

Page 11: "The grounds for such intervention may be briefly summarized as follows:

"*First*.—In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate, it is no answer to say that this is all in another country, belonging to another nation, and is therefore none of our business. It is especially our duty, for it is right at our door."

On the day on which this message was sent to the Congress, the President received by previous arrangement a visit from the Ambassadors of Great Britain, France, Germany and Italy, the Russian Chargé d'Affaires, and the Austrian Minister. Sir Julian Pauncefote, the British Ambassador, as dean of the diplomatic corps, presented a note signed by the six visitors in their respective capacities, appealing "to the feelings of humanity and moderation of the

President and of the American people in their existing differences with Spain," and expressing "a hope that further negotiations will lead to an agreement which, while securing the maintenance of peace, will afford all necessary guarantees of the re-establishment of order in Cuba."

The President's response echoed the hope of a peace secured by "necessary guarantees for the re-establishment of order in the Island, so terminating the chronic condition of disturbance there, which so deeply injures the interest and menaces the tranquillity of the American nation by the character and consequences of the struggle thus kept up at our door, besides shocking its sentiment of humanity."

In view of the statements made thus explicitly to the Ambassadors of the neutral powers, contemporaneously with the message to the Congress, and published to the world as the declared intention and purpose of the United States, it is not surprising that a neutral residing in Jamaica should have felt justified in sending a vessel to a port in Cuba in the possession of the United States, respecting which no official blockade had been declared, for the purpose of asking permission to take away refugees. This belief on the part of the neutral was fortified by the fact that the United States Government itself had previously chartered from this neutral owner the very ship that was afterwards seized, to go to a blockaded port, Cienfuegos, and bring away refugees.

It was of more importance to the United States to have her undertake this last voyage than any previous one. If the earlier refugees which the *Adula* took away had not been removed, they would not have been a burden upon the resources of the United States. But the refugees whom the *Adula* went for at the end of June did become a burden of a most serious character. It would have been a distinct advantage to the United States in their military operations, if the *Adula* had been allowed to go to the entrance of Santiago Harbor, and take away as many non-combatants and neutrals from that city as she could carry. But a majority of the Court held that relief in the premises must be had from the Executive and not from the Court.

In view of this decision, it is interesting to refer to a

declaration of the President of the United States made just after the treaty of peace.

In his message to the Congress in December, 1898, the following statement is made of the lesson taught from the experience of the war. Page 37 :

"The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceable trade and commerce. It is true we may suffer less in such cases than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension, into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers, with a view to incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers."

The purpose thus declared is in pursuance of the historic policy of the United States. Under date of August 1, 1823, Mr. Adams, then Secretary of State, wrote to Mr. Middleton, United States Minister to Russia :

"The principle upon which the Government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea. If there be any objection to this conclusion, I know not in what it consists; and if any should occur to the Russian Government, we only wish that it may be made the subject of amicable discussion."<sup>1</sup>

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<sup>1</sup> Adams to Middleton; Wharton's Int. Law Dig., Sect. 342, Vol. 3, p. 261.

Mr. Seward, the Secretary of State, in addressing the United States Ministers in European countries, April 24, 1861, wrote :

“ For your own information it will be sufficient to say that the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals not contraband should be exempt from seizure and confiscation by national vessels in maritime war.”<sup>1</sup>

*Position of Cubans During the War.*—An interesting question in this connection arose in the case of *The Benito Estenger*.<sup>2</sup> It was maintained by the counsel for the ship that the declared policy of the United States, which has previously been stated, in reference to the inhabitants of the Island of Cuba, put them in the position of friends, and that a vessel belonging to a person who had been a Spanish subject, but who was a Cuban and friendly to the Insurgents, could not lawfully be captured. The majority of the Court, however, held otherwise, and adhered to the old rule “ that in war the citizens or subjects of the belligerents are enemies to each other, without regard to individual sentiments or disposition, and that political status determines the question of enemy ownership.”

In this case, also, the Court adhered to the rigor of the old decisions in reference to a transfer of the legal title to a ship to a neutral owner during a war. The Cuban owner, pending the war, had executed a bill of sale of the ship to a British subject. The burden of showing the *bona fides* of a sale under such circumstances was held to be upon the claimant, and very positive evidence was exacted in support of the *bona fides* of the sale.

It must be admitted in this case that the fact that the former owner was on board the ship at the time of the capture, and was evidently interested in her movements, though not positively directing them, was very suspicious.

*Fishing Boats.*—In another of the prize cases <sup>3</sup> the Supreme Court (also by a divided vote) showed a greater dis-

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<sup>1</sup> Wharton's Int. Law Dig., Sect. 342, Vol. 3, p. 275.

<sup>2</sup> 176 United States Reports, page 568.

<sup>3</sup> The *Paquete Habana*, 175 United States Reports, 354.

position than in the case of the *Adula*, to recognize the growth and development of international law. In that case, and in others which were involved in it, blockading vessels of the United States had captured numerous small fishing boats which were engaged in catching fish off the shore of the Island of Cuba for domestic consumption. The case was argued with great learning and ability by the counsel for the fishermen, and he succeeded in convincing the Court that by international law, by the general consent of civilized nations, and independently of express treaty, fishing vessels honestly pursuing the calling of catching and bringing in fresh fish were exempt from capture.

The Court recognized that such a calling might often be made a pretext for obtaining information as to the coast and the fleet of an enemy. Several cases were cited, in which the fishery was held to have been such a pretext in the British Channel during the Napoleonic wars. The decision does not impair the right of one belligerent to seize fishing boats shown to be actually engaged in obtaining information for the other belligerent.

*Mail Steamers.*—In the case of the *Panama*<sup>1</sup>, it was argued by counsel for the owners that under the modern law of civilized nations, mail steamers were exempt from capture. And further, that under the circumstances of that case the United States must be considered as having consented to the voyage, and thereby impliedly waived the right to seize the vessel.

The *Panama* was a Spanish mail steamer engaged in transporting passengers, mails and freight between New York and Havana. She was cleared by the United States authorities from the New York Custom House, and sailed from New York for Havana on the 20th of April, 1898, with United States mails on board. An Act of Congress declared war to have existed from the twenty-first of April. The Court held that such clearance and carriage of mails were subject to the right of the Government, in case of a declaration of war, to seize the vessel before she reached her destination.

*President's Proclamation.*—At the beginning of the war

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<sup>1</sup> 176 United States Reports, page 535.

the President of the United States, following the practice which had previously been adopted by many civilized nations, issued a proclamation in reference to vessels engaged in commerce, and belonging to the subjects of the other belligerent. The fourth and fifth clauses of this proclamation are as follows:

“*Fourth.*—Spanish merchant vessels, in any ports or places within the United States, shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy; or any coal (except such as may be necessary for their voyage), or any other article prohibited, or contraband of war, or any dispatch of or to the Spanish government.

“*Fifth.*—Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.”

In the case lastly referred to, it appeared that the *Panama*, pursuant to contract with the Spanish Government for carrying the mails, was armed with five cannon, some rifles and ammunition. The cannon had been on board over three years, the rifles and ammunition over two. She was constructed with a view to possible use in war. The Court held that these circumstances brought her within the language of the proviso contained in the fourth clause of the proclamation. This decision is of general importance. The principal maritime nations of the world have contracts with the owners of steamships, similar to those which the Spanish government had with the company to which the *Panama* belonged. If this decision should be adopted by other nations, it will take all such vessels out of the protection given by proclamation to vessels sailing from or bound for the ports of one belligerent

at the time of the outbreak of hostilities. It is obvious that if any other construction were to be adopted, vessels of the character referred to could enter their home port and might become of essential assistance to the belligerent owning such port. In point of fact, during the Spanish war, two vessels belonging to the American Line were taken by the United States Government, converted into auxiliary cruisers, and rendered important services during the progress of hostilities.

In another case arising under the same proclamation, that of the *Buena Ventura*<sup>1</sup>, it was held that the proclamation, although not issued at the very beginning of the war, was retroactive, and exempted from capture vessels which were within its terms at the beginning of the war, although they were captured before the proclamation was issued. In this case the seizure was made April 22, 1898, and the proclamation was not issued until April 26, 1898. The ultimate destination of the steamer was Rotterdam, but her immediate destination was Norfolk, Virginia, in the United States, to take in coal.

On the other hand, in *The Pedro*<sup>2</sup> and *The Guido*<sup>3</sup> the Court held that the fact that the ultimate destination of the captured vessel was a port in the United States would not exempt her from capture, provided her immediate destination was an enemy's port.

In the case of *The Pedro*, the steamer sailed from Havana for Santiago, on the 22d of April. Her ultimate destination was Pensacola. But it was held by a majority of the Court that the doctrine of a continuous voyage did not apply to this case, and that while it was true that *The Pedro* would have been exempt had she sailed from Havana direct for Pensacola, yet the fact of her sailing for Santiago put her without the pale of the proclamation, and subjected her to capture as enemy's property. In this case four of the Justices dissented.

In *The Guido*, the proof was less clear of ultimate intention to go to a port within the United States. The same

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<sup>1</sup> 175 United States Reports, 384.

<sup>2</sup> 175 United States Reports, 354.

<sup>3</sup> 175 United States Reports, 382.



rule was applied as in that of *The Pedro*. Three of the Justices dissented.

*Liens for Advances by Neutrals on Enemy's Cargo.*—In *The Carlos F. Roses*<sup>1</sup> a Spanish barque was captured at sea on her course to Havana. The cargo was consigned to Spanish subjects in Havana, by citizens of a neutral State. The Court held that, on the evidence, when the goods were delivered to the vessel, they became the property of the consignees. Indeed no claim to the proceeds of the cargo was interposed by the consignors. A claim was interposed by bankers in England, who had made advances upon the cargo, and had received as security therefor the bills of lading duly endorsed in blank. The consignors drew drafts upon the British bankers for the amount of the advances, which drafts were paid by them. The Court held that there was not sufficient evidence that it was the intention of the consignors to vest the title to the cargo in the drawees of the bills. No evidence was introduced as to the real nature of the transaction, and the bills of lading were not produced by the drawees. It was evidently the opinion of the Court that the bankers probably had some other indemnity, and it was held that the mere fact that bills of lading endorsed in blank were forwarded to the bankers, accompanying the bills of exchange drawn upon them, did not operate to vest the title in the drawees. Two Justices of the Court dissented upon this latter point, and held that the documentary evidence, in the absence of contradiction, established that the title to the cargo vested in the neutral, and that therefore it was not lawful prize, so far at any rate as his interest to the extent of his advances was concerned. The earlier decisions were approved, to the effect that liens of bottomry bonds, of mortgages, and for supplies, are not protected in the prize courts, and “that the right of capture acts upon the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens of private engagements of the parties.” The language of Lord Stowell in *The Marianna*<sup>2</sup> is quoted with approval.

“Even if bills of lading are delivered, that circumstance

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<sup>1</sup> 177 United States Reports, 655.

<sup>2</sup> 6 C. Robinson Reports, 24.

will not be sufficient unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage and as to the market to which they are consigned."

*Summary.*—To sum up the result of these decisions, we may say that the rule of the American courts upon the subjects covered by them is as follows :

I. In the case of a neutral captured near a blockaded port, proof of actual intent to run the blockade must be clear and decisive.

II. A blockade may be effective, though carried on by one armed cruiser only.

III. A blockade *de facto* may be established by a naval commander without express authority from the Executive. Knowledge of such a blockade is equivalent to formal notice of a blockade *de jure*. Sailing from a neutral port bound for a port where such a blockade *de facto* is maintained subjects the neutral vessel to forfeiture, though there be no actual intent to run the blockade.

IV. Where one nation intervenes in domestic insurrection and takes sides with the insurgents, merchantmen belonging to the insurgents will nevertheless be considered as enemy's property.

V. Fishing boats engaged solely in domestic fishery are exempt from seizure as prize of war.

VI. Mail steamers, as such, are not exempt from seizure as prize of war.

VII. Proclamations allowing vessels belonging to one belligerent to sail either from or for the ports of the other belligerent, will be liberally construed, and, if issued after the commencement of hostilities, will be considered to relate back to the beginning of the war. But they will not extend to vessels which are adapted for use in warfare under contract with the belligerent government, although in point of fact they never have been so used.

VIII. When cargo consigned to an enemy is captured on an enemy's vessel, title in a neutral claimant will not be sufficiently established by proof that he has made advances for the purchase of the cargo, and has paid drafts drawn on him for the amount of the advances, which drafts were accompanied by bills of lading endorsed in blank.

It is hoped that this statement of the decisions of the United States Supreme Court during the war with Spain, now fortunately terminated, will be of interest, not only as throwing light upon the law of prize, but as illustrating the gradual evolution and development of international law. To a greater extent than any other body of law, international law is the result of usage. No Parliament of the world has yet assembled. The nearest approach to this is to be found in the conferences that meet from time to time, and which have recommended for adoption by the nations composing them, certain modifications of the customary law as it had been previously understood to exist. The law of nations, however, is composed to a much greater extent of the results of usage than it is of the Conventions of International Conferences. It follows of necessity from the very nature of usage that it is subject to modification as the conditions which gave rise to it themselves are changed.

A remarkable illustration of this is to be found in the case of cartel ships. During the wars with Napoleon, it was held by the English courts that such ships were exempt from capture, although they belonged to one of the belligerents: In the *Daijfié*,<sup>1</sup> Lord Stowell says:

“ The question is, whether from the circumstances under which they were taken, they (cartel ships) are to be considered under the protection of that character or not. It is a practice of no very ancient introduction among the states of Europe, to exchange prisoners of war in this manner; it has succeeded to the older practice of ransoming, which succeeded to the still more ancient practice of killing, or carrying them into captivity. I say it is a practice of no remote antiquity, because, on looking into Grotius, I find not a word of exchange, in the sense in which we are now speaking of it. It is a practice, therefore, which, at least as far as his writings seem to indicate, was not of very familiar and general use in his time, though perhaps not altogether unknown. It is, however, of a nature highly deserving of every favorable consideration, upon the same principles as are all other *commercii belli*, by which the violence of war may be allayed, as far as is consistent with its purposes, and by which, something of a pacific inter-

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<sup>1</sup> 3 C. Robinson, 139, 140.

course may be kept up, which, in time, may lead to an adjustment of differences, and end ultimately in peace."

A clear statement of other changes in the law of prize which have gradually developed as nations have become more civilized, and the usages of war more humane, is given by the Supreme Court in its judgment in the case of the *Paquete Habana*<sup>1</sup>.

"By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the Government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com., 91, note; Halleck, Chap. 20, Sec. 22; Calvo, Sec. 2376; Hall, Sec. 138.

"In 1813, while the United States were at war with England, an American vessel on her voyage from Italy to the United States was captured by an English ship, and brought into Halifax, in Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice-Admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia was granted by Dr. Croke, the Judge of that Court, who said: 'The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered, not as the peculium of this or of that nation; but as the property of mankind at large, and as belonging to the common interests of the whole species.' And he added that there had been 'innumerable cases of the mutual exercise of this courtesy between nations in former wars.' The Marquis de Somerueles, Stewart Adm. (Nova Scotia), 445, 482.

"In 1861, during the war of the Rebellion, a similar decision was made in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal and restored to the agent of the university, said: 'Though this claimant, as the resident of a hostile district, would not

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<sup>1</sup> 175 United States Reports, 677.

be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory.' He then referred to the decision in *Nova Scotia*, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books." *The Amelia*, 4 Phila., 417.

These changes in the usages of nations naturally first became known to the Executive Department of Governments. In the nature of the case the Executive is more flexible in its action than the Judiciary. The respect which is paid to precedent may differ in different nations. But the tendency in every nation is that an organization of a permanent character will adhere to its traditions. In civilized countries no organization is more permanent than courts of justice. In none is the disposition to adhere to tradition or precedent stronger. The danger is that Courts will adhere too closely to traditions, and that the law will thus tend to crystallize and become rigid. A wise system of law, however, should be flexible, and grow with the growth of nations. To use the language of Prof. Lawrence, of the University of Cambridge ("Principles of International Law"; preface):

"International law may be regarded as a living organism which grows with the growth of experience, and is shaped in the last resort by the ideas and aspirations current among civilized mankind."

The same is true of other branches of the law. In reference to equity jurisprudence as administered in the Court of Chancery, Lord Chancellor Cottenham says<sup>1</sup>:

"I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice and to enforce rights for which there is no

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<sup>1</sup>Walworth v. Holt, 4 Mylne & Craig, 619, 635.

other remedy. This has always been the principle of this Court, though not all times sufficiently attended to."

Chief Justice Gibson, an eminent American jurist, delivering the judgment of the Supreme Court of Pennsylvania, uses the following language<sup>1</sup> :

"It is one of the noblest properties of this common law, that instead of moulding the habits, the manners and transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvements of the age."

It is a misfortune to any nation when this growth ceases. Fortunate, indeed, is that country whose courts are so enlightened as to hold the happy mean between that fickle temper which is destructive of stable institutions, and that ultra-conservatism which deprives a nation of the unspeakable benefit of a system of law adapted to its needs and growing with its growth.

EVERETT P. WHEELER.

<sup>1</sup> *Lyle v. Richards*, 9 Sergt. & Rawle (Penn.), 322. See also *Holden v. Hardy*, 169 United States Reports, 366, 385, 388.

THE MODERN LAW OF REAL PROPERTY IN  
NEW YORK.

HERE in New York, as elsewhere, the actual conditions of the law of real property are the result of certain historic forces. Although originally a Dutch settlement, New York, soon after the English conquest in the year 1664, possessed a system of laws and institutions much more closely resembling those of England than those of New England. When the English had subdued New Netherland, they at once promulgated the laws of England with an explicitness not observable in the other American plantations. It was obviously the intention of the governing authorities to get rid of the Dutch laws as soon as possible. Consequently few of them survived the year 1700, and those only by force of treaty or compact. For a time after 1664 the Dutch *ante-nati* had a sort of personal, as contradistinguished from the territorial, law.<sup>1</sup> With the death, or the naturalization, of the *ante-nati*, their personal law disappeared, and now but three or four unwritten laws of Dutch origin linger on in the jurisprudence of New York.

Not only the laws, but the institutions, of England flourished in New York, and when the War of Independence broke out, even the manorial system of England had taken firmer hold and borne better fruit in this province than elsewhere in America, with the possible exception of Prince Edward's Island, in the Gulf of St. Lawrence, where it lasted until very recent days.<sup>2</sup> Land in the Province of New York was all held of the Crown, by the tenure of free and common socage, as of the King's Manor of East Greenwich, in Kent. The first Constitution of the State not only

<sup>1</sup> Cf. Savigny, *Roman Law in the Middle Ages*. London, Edit. 1829, p. 99.

<sup>2</sup> Prince Edward's Island presents the first instance of a legislative expropriation of landlords. This was followed afterwards by the Irish acts, where the proceedings in Prince Edward's Island were closely followed by the law officers of the Crown.

expressly adopted the English law of real property in force in the Province of New York at the date of the battle of Lexington and Concord, but it also confirmed all existing estates in land, held under Crown grants.<sup>1</sup> Thus, by a series of enactments the English law of real property in force in the Province of New York was translated into the new order of things.

While the common law of England furnished the law of estates in New York until the War of Independence, there were even in colonial days some few points of departure in non essentials. The simpler economic and social conditions prevailing in a colony did not require the elaborate legal machinery of the parent State and there was a visible tendency in New York to resort to the simpler and more ancient phases of the national law. Sugden, in his introduction to Gilbert's "Uses and Trusts," states that "simplicity was the striking feature of the common law, in regard as well to the estates which might be created, as to the modes by which they might be raised."<sup>2</sup> It was not until about the year 1700 that an increasing subtlety and complexity in the forms of conveyancing began to set in in England.<sup>3</sup> But the colonies—and New York was no exception—generally ignored these late inventions of the English conveyancers, adhering to the simpler and more antique modes. With this exception the English law was generally followed, and one of the first law books published in New York was an original "Essay on the Theory and Practice of Fines."<sup>4</sup> On most other subjects the Bar depended wholly on the old English law books, and there were some admirable conveyancers and "black-letter lawyers" among the colonial barristers of New York.

A French jurist, Ortolan, has observed that political revolutions make few changes in the outward forms of laws and institutions, but that they sow the seeds of immense and comprehensive change. The truth of this observation

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<sup>1</sup> Secs. xxxv, xxxvi, Constitution of 1777.

<sup>2</sup> Sugden's Gilbert. x London Edit., 1811.

<sup>3</sup> Wood, Preface to the "Institute of the Laws of England." London Edit., 1772. Lord Mansfield in Case of Buckworth, in the K. B., 1 Hargrave's Collectanea Juridica, 335.

<sup>4</sup> By William Wyche; published by Rivington, New York, 1794.



is apparent in the instance of New York. The revolutionary government by resolutions simply transferred the "seigniorship" and the "quit rents" of the Crown to the political abstraction, called the State.<sup>1</sup> The lands themselves long continued to be held of the State as successor to the Crown and by the tenure of free and common socage. Not until the year 1787 was any part of the lands in the State declared to be allodial and then only that portion newly granted under the great seal of the State.<sup>2</sup> It was not until 1830 that the Revised Statutes finally abolished tenure and declared all lands allodial.<sup>3</sup>

Prior to the year 1830, the reforms made in the common law of real property had not been very radical, if we except the law abolishing primogeniture, and establishing new canons of descent.<sup>4</sup> It is true, fees tail, or estates tail, had been converted by an act of the Legislature, passed in 1782 into fees simple.<sup>5</sup> But as that act simply accomplished what might be then accomplished by a disentailing assurance, the particular reform was not very marked or consequential.

That the English law, which continued the basis of the land law of this State, was largely feudal in origin is very familiar, as it is conceded by all the commentators. It has been truly said "that the most elementary conceptions of the English law of real property carry us back to the relations of lord and vassal, and cannot be understood without reference to them." At the time of the adoption of the first constitution of this State,<sup>6</sup> the feudal origin of the contemporaneous English land law was much more apparent than at present, when juridical theories of "contract" have come to dominate those archaic legal obligations once due to "status." Sir Henry Maine has emphasized the fact "that the movement of all progressive societies has been a movement from status to contract."<sup>7</sup> The truth of this

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<sup>1</sup> Journal of Provincial Convention I, 554; 1 J. & V., 44, Sec. 14.

<sup>2</sup> 2 J. & V., 67.

<sup>3</sup> 1 R. S., 718, Sec. 3.

<sup>4</sup> 1 J. & V., 245. C. 2, Laws of 1782. C. 12, Laws of 1786.

<sup>5</sup> C. 2, Laws of 1782; Chap. 12, Laws of 1786.

<sup>6</sup> April, 1777.

<sup>7</sup> Maine Ancient Laws, 165.

observation is apparent in the real property law of England. The division between "free" and villein tenures, no doubt, once accurately corresponded to a division according to status of the population of England.<sup>1</sup> The term "estate" once served to indicate the status of a tenant, just as did that other term "freeholder." But as we wish to speak here of the fact that many legal rights and duties which the common law once imputed to status or tenure are now imputed to contract by the modern law of this State, it is not necessary to follow in detail the emergence of new legal concepts from primitive forms. It will be necessary only to indicate certain general doctrines of the common law which have been wholly extirpated by the reforms instituted in this State.

The common law of land adopted by the first constitution of New York originally took no direct notice of land as property. By that law a tenant of land had only an estate or interest in it—the king was the sole allodial proprietor. Although such estates in the colonies had then recently become assets for creditors and liable even for simple contract debts of decedents,<sup>2</sup> the law itself still bore many marks of a system formulated at a time when land was not property and when rights and obligations regarding land were considered as privileges due to *status*. So it contained many rules regarding the limitations of future estates which were of distinctly feudal origin. The motive of the Revised Statutes was not only to abolish these rules but to place land in its true position as immovable property, and to make of conveyances contracts.

The first radical change made in the theory of our ancient law of real property by the Legislature of New York was the partial abolition of "tenure" by the Act of 1787.<sup>3</sup> Thereafter all lands granted by the State under its great seal were to be allodial, notwithstanding that all the occupied lands, granted originally by the Crown, or held

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<sup>1</sup> Challis, R. P., 6, 7.

<sup>2</sup> By act of the British Parliament, 5 Geo. II, c. 7, lands in the colonies were made assets for simple contract creditors. But until 1774 in New York neither heirs nor devisees were liable for even specialty debts of ancestor after they had aliened their estates. Chap. 12, N. Y., Laws of 1774.

<sup>3</sup> 2 J. & V., 67.

of it, were to continue to be held of the State by the old tenure of free and common socage. The fact that such lands were "in tenure" of itself then implied by the common law that the rights and obligations due to "tenure" were to be continued. It is true that after the Statute 12, Car. II, c. 24, abolishing the burdens of the military tenures and converting such tenures into the tenure by free and common socage, the worst features of feudal tenures had disappeared. But the legal term "tenure" still continued to denote the specific feudal relation between a "lord" and a "tenant,"<sup>1</sup> while on the existence of tenure depended certain legal rights and reciprocal obligations—whenever there was a tenure "fealty" was due, and the lord might distrain.<sup>2</sup> The partial abolition of tenure made it necessary to modify this principle, or the allodial owner would have been deprived of any effectual remedy for his rent due and unpaid. When the courts announced that the right of distraint for socage services was independent of tenure,<sup>3</sup> the last vestige of legal obligations arising out of mere *status* was swept away in New York and made to depend upon contract. It is hardly necessary to point out that this was a departure from the principles of the common law and subversive of many ancient conceptions of legal rights and remedies. That it was a wise departure is apparent, for it led to the declarations in the Revised Statutes abolishing every remnant of tenure and making all land allodial.

The substance and effect of this extraordinary change is well pointed out by the Court of Appeals in the case of *Van Rensselaer v. Dennison*<sup>4</sup>, where it is said, "Since the Act of 1787 \* \* \* these rules \* \* \* which were of feudal extraction or resulted from the obligations arising out of the feudal relation, are now abrogated. But, in all the decisions of this Court bearing upon the subject, careful attention has been given to the important distinction between conditions, implied by the law of feudal tenures and those which the parties to a grant expressly mention and create in the conveyance. Any condition of

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<sup>1</sup> *Atty. Genl. of Ontario v. Mercer*, 8 App. Cas., 767, 772.

<sup>2</sup> *Cornell v. Lamb*, 2 Cow., 652.

<sup>3</sup> *Cornell v. Lamb*, 2 Cow., 652.

<sup>4</sup> 35 N. Y., 393.

the latter kind is valid if consistent with the general rules of law \* \* \* . This is wholly independent of tenure." While the Court was in reality commenting on the New York re-enactment of the Statute of Quia Emptores, the language itself shows that judicial conceptions had outstripped the contents of the common law and were prepared to enforce all the obligations between landlord and tenant or tenant and reversioner, upon the theory of "contract." The modern English books and cases can show no such advance in legal principle.

Before considering another reform instituted by the Revised Statutes it may be well to point out that the distinction, at first made for historical reasons, in the Roman law, between a "contract" and a "conveyance," has no actual place in the jurisprudence of the common law. The classification of the classical jurists exclude "conveyances" from "contracts" <sup>1</sup> not because a conveyance may never be a contract, but because it happened that their conveyances universally gave rise to rights *in rem* and their contracts, to rights *in personam*. In the common law no such distinction exists. Thus a sale of chattels is always regarded by common lawyers as both a contract and a conveyance—consequently after the Statute of Uses when conveyances of land might be effected simply by deed, the deed is always regarded as both a contract and a conveyance,<sup>2</sup> and this remains true, even where the deed is pursuant to a contract of sale. With this explanation we may proceed to the reform in question.

The Revised Statutes wholly abolished feoffment with livery of seisin<sup>3</sup> as a mode of conveyance, and placed all future conveyances of land upon the basis of other specialty contracts and conveyances. Feoffment with livery was the oldest form of conveyance, according to the common law. There is reason to believe that at its origin it was regarded by the feudists as a public ceremony defining the *status* of the tenant, and only incidentally conferring rights over land. The charter or deed of feoffment, prior to the

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<sup>1</sup> Dig., 50, 16, 67.

<sup>2</sup> Co. on Litt., 1716; 2 Washburn Real Prop., 553 (1st Edit.); Preston, Shep. Touch., 50.

<sup>3</sup> 1 R. S., 738, Sec. 136.

Statute of Frauds, had little title to be regarded as a part of the conveyance, as it was used to record rights rather than to create them. Yet, long prior to the Statute of Frauds, the charter or deed of feoffment was habitually used in connexion with livery of seisin, and at a time when the entire English law of contract was in a most rudimentary condition, concerned with goods and chattels only, and not with land<sup>1</sup>. Consequently, even mediæval English lawyers never came to associate a charter of feoffment with other specialty contracts. Perkins, in his Profitable Book, after the Statute of Uses, distinctly contrasts deeds of feoffment with other deeds of conveyances, although deeds of bargain and sale had then come to be regarded as contracts, or from the point of view of other specialty contracts. Consequently, we find the new contract doctrine of consideration<sup>2</sup> applied to all conveyances not operating by transmutation of possession<sup>3</sup>, but never to feoffments with livery. The last conveyance in New York by feoffment with livery of seisin took place only shortly before the adoption of the Revised Statutes in 1830<sup>4</sup>.

The very distinguished and able lawyers who framed the Revised Statutes of New York, having made all lands allodial, or property in the highest sense of the term, desired to place all future conveyances of land upon the same foundation as the other specialty contracts and conveyances known to the common law. They consequently abolished for the future conveyances by feoffment with livery of seisin and substituted therefor the simple 'grant' or deed under seal<sup>5</sup>, which, according to their conceptions, coincided with former deeds of bargain and sale<sup>6</sup>. Their intention to expel from the law of this all feudal obligations founded upon *status*, and to place real estate in the category of "immovable property," which it only

<sup>1</sup> Cf., 1 Pollock & Maitland, History of English Law, 34; 2 *Ibid.*, 1 2 *et seq.*

<sup>2</sup> This doctrine dates from the year 1425. Jenks' Law and Politics in the Middle Ages, 282-287; History of Consideration, Chapter III.

<sup>3</sup> Preston's, Sheppard's Touchstone, 510; Abstracts of Title III, 13; Hargrave's Note, 310. Co. on Litt., 48a; Wood v. Chapin, 13 N. Y., at p. 517.

<sup>4</sup> McGregor v. Comstock, 17 N. Y., at p. 169.

<sup>5</sup> 1 R. S., 738, Sec. 137.

<sup>6</sup> 1 R. S., 739, Sec. 142.

imperfectly was by the theory of the common law is very manifest from the provisions noticed. Deeds or grants had theretofore no special reference to conveyances of corporeal hereditaments; they were appropriate modes to transfer all kinds of property, whether movable or immovable.<sup>1</sup> By adopting the common deed as the sole future form of conveyance and by the abolition of feoffments with livery of seisin, the revisers did much to simplify conveyancing in New York and to do away with the distinction between "grant" and "livery" and between real property and personal property—a distinction utterly unknown to the Roman law. Since then the delivery of the deed—the legal inception of all alienatory contracts in writing—plays a more important part in our law of conveyancing.<sup>2</sup> At common law the date of the delivery of the deed of land was inconsequential, as title dated from the delivery of seisin only,<sup>3</sup> while after the Statute of Uses a covenant to stand seised might be effectual without delivery.

The more important reforms made by the Revised Statutes in the common law of real property related to the creation of future estates in lands. In their attempt to deal with this subject the revisers were confronted with three separate sets of rules regulating the limitation of future estates in lands. The oldest arose in the days of feudalism and governed "legal limitations" or "assurances, good by the common law." The second related to "uses," and depended on the Statute of Uses and its judicial exposition. The third set of rules was concerned with "executory devises" and depended on the Statute of Wills and its construction. These various rules were not always consistent with each other, and consequently a limitation might be valid if contained in one instrument, and void if contained in another. The reason for this inconsistency, of course, depended on the exigencies of a historical jurisprudence. In the great conservative nations of history the ancient or common law is always expressly abrogated with much reluctance, although necessity frequently changes it by a re-

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<sup>1</sup>Blewitt v. Boorum, 142 N. Y., at p. 360.

<sup>2</sup>1 R. S., 732, Sec. 738; Chauncey v. Arnold, 24 N. Y., 330, 335; People v. Bostwick, 32 N. Y., 445; Mitchell v. Bartlett, 51 N. Y., 447.

<sup>3</sup>Challis, R. P., 83.

sort to fiction or other indirection. Thus, in theory, the ancient law stands unchanged, and yet, in fact, inconsistent practices are fully legalized. It is not, however, of these trite facts we wish to speak, but of the way the revisers dealt with the inconsistent rules mentioned.

In retaining the old term "estate" to denote allodial property in lands, the revisers were not inconsistent, for the Statute had somewhat qualified the allodial character of such lands by the declaration that the original and ultimate property of all such lands was to remain in the State, and that they were to continue subject to escheats.<sup>1</sup> Thus, the ownership of lands remains, in so far as the sovereign is concerned, a qualified interest and is therefore properly designated, even since the Revised Statutes, by the old common-law term "estate." The Revised Statutes did not profess otherwise to change the law relating to estates in possession, but were intended to regulate the creation of future estates in lands, so as to produce simplicity and uniformity in the laws. In order to accomplish this purpose the revisors were not forced to invent new rules, but rather to select and make uniform in operation the best of the old rules relating to uses and executory devises, whether such rules were of legal or equitable origin.<sup>2</sup> This selection accomplished, the abolition of the ancient rules relating to legal limitations naturally followed, if they had been founded for purely feudal reasons. The result of this method of reform was a tolerably complete code of laws regulating the creation and the alienation of estates in lands.<sup>3</sup>

Prior to the Statute of Uses, 27 Hen. viii, c. 10, the rules of the common law regulating the limitation or creation of future estates were few. No remainder could be limited in expectancy on a fee simple.<sup>4</sup> Abeyance of the seisin by

<sup>1</sup> 1 R. S., 718, Secs. 1, 3, now since 1846 in Article I, Constitution.

<sup>2</sup> Reviser's Note to Article I. Tit. 4, Chap. I, Part II, R. S.

<sup>3</sup> Chap. I, Part II, R. S.

<sup>4</sup> There is some uncertainty in the old law concerning whether a remainder could have been limited on a determinable fee or on a conditional fee. Challis was of the opinion that no remainder could be limited on either a determinable or a conditional fee (Challis, R. P., 64). But Lord Hardwicke did not agree with him as to a remainder on a determinable fee (Hargrave Collect, Jurid. I, 383); nor did Bracton coincide concerning the validity of a limitation of a remainder on a conditional fee (Law Quar. Rev. VI, 22). But Mr. Challis' opinion is always entitled to the greatest weight, as he was a master of both law and logic.

act of the parties was forbidden, for the feudal or early common law required that the tenancy should always be full so that there might be some one to do the lord's bidding or respond to process in real actions. From this fundamental legal rule were deduced the subordinate rules, that no estate of freehold could be limited to take effect *in futuro* except by way of remainder, nor could it be so limited as to exist at intervals and not continuously. For the same reason the legal rules regulating the limitation or creation of estates by way of remainder became very strict. A contingent remainder of freehold could not be limited on a term of years, as this would put the seisin in abeyance. But after the Statutes of Uses and Wills such a limitation, though void in any assurance taking effect only by the common law, was good as a use or as an executory devise. So a fee might in effect be limited in remainder on a fee if limited as a use or a devise. Thus the validity of limitations came to depend on the nature of the instrument containing them.

The New York revisers, in the year 1630, wholly abrogated all the distinctions indicated, permitting a freehold estate to begin *in futuro* and a contingent remainder to be limited on a term of years, or a fee to be limited on a fee, provided such limitations took effect within the time prescribed by their new rule against perpetuities.<sup>1</sup> Up to this point, as it will be perceived, the effect of the reform, instituted by the Revised Statutes, was to abolish the rules regulating legal limitations, or those contained in assurances taking effect by the common law, and to extend the application of the newer rules regulating uses and executory devises to all instruments creating future estates. But as uses and executory devises were subject to the rule against perpetuities, the revisers distinctly provided that every limitation of an expectant estate should conform to their new or revised rule against perpetuities.<sup>2</sup> Thus the new rule came to play a much more important part in the law of conveyancing than the old rule had played in the common law, for that rule had arisen subsequently to the common law

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<sup>1</sup> 1 R. S., 724, Sec. 24.

<sup>2</sup> 1 R. S., 724, Secs. 14, 15, 16, 20.



rules regulating legal limitations and had no relation to them. The common law had provided a scheme of its own against perpetuities,<sup>1</sup> and until the rise of uses and executory devises, the rule against perpetuities had not been heard of, and, as Challis points out, its extension to legal limitations always "implies an anacronism which may be said to trench on absurdity."<sup>2</sup> Such also was the opinion of Lord St. Leonards,<sup>3</sup> while this opinion of these masters of the law of real property has not escaped a challenge from very respectable sources<sup>4</sup> it is safe to assume that it will prevail, as the more recent investigations and authorities tend only to corroborate it.<sup>5</sup> But whether or not the old rule against perpetuities applied to contingent remainders, the revised rule in New York was made applicable to all limitations of future estates if they were inalienable beyond the time limit.

We have stated that the new rule against perpetuities, as formulated by the revisers of New York, has become the great test of the validity of any limitation of a remote future estate. But it is not the sole test, for several subordinate rules in harmony with it were directed against the limitation of successive estates for life. By the common law any member of successive life estates might be limited to persons *in esse*. The revisers reduced the indefinite number to two and cut off the subsequent life estates by accelerating the vesting of the remainder in fee.<sup>6</sup> In like manner they restricted the limitation of remainders, de-

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<sup>1</sup> *e. g.*: An estate could not be limited to the right heirs (as purchasers) of a person not *in esse* (2 Rep., 51 a, b; 2 Bl. Com., 170) for this was "a double possibility" which was illegal. This rule has very recently been held independent of the Rule against Perpetuities (*Whitley v. Mitchell*, 42 Ch. D., 494; 44 Ch. D., 85, 90; Law Quar. Rev., XIV., 133), contrary to the express opinion of Prof. Gray of Harvard, and in agreement with the opinion of the late Mr. Challis.

<sup>2</sup> Challis, R. P., 159, 160.

<sup>3</sup> 4 D. & War., 1, 27; 2 H. L. C., 186.

<sup>4</sup> Lewis, Perpetuities, Chap. XVI, and supplement of 1849, p. 97; Gray Rule against Perp., pp. 80, 81, 205; Law Quar. Rev., XIV, 234.

<sup>5</sup> Cf. Challis, R. P., 159, 160; Williams, Jurid. So. Papers, I, 45, and Maitland Law Quar. Rev., VI, 23; Pol. & Mait., Hist. Eng. Law II, 23, as to the dispute concerning the antiquity of contingent remainders and their judicial recognition prior to the Rule against Perpetuities.

<sup>6</sup> 1 R. S. 723, Sec. 17.

pending on estates the *pur autre vie*, or lives of nominees not connected with the legal title, by reducing the permissible lives to two.<sup>1</sup> The new rule against perpetuities permitted the power of alienation to be suspended for two lives in being and in a single case for an actual minority beyond the dropping of the life of the surviving *cestui que vie*.<sup>2</sup> Such minority was never, however, a term in gross as at common law, but always an actual minority of a person *in esse* at the extinction of the second permissible life. Thus the real reform of the Revised Statutes consisted in reducing the period prescribed by the common law rule against perpetuities from any number of lives in being to two, and the term of twenty-one years in gross to an actual minority.

The revisers' attempt to remodel the old rule against perpetuities constrained them to define a perpetuity. For the first time in the history of common law countries a legislative definition of a perpetuity was consequently formulated, with the result of occasioning an ultimate departure in New York from the later decisions of the courts of many other common law jurisdictions. At the time of the enactment of the Revised Statutes the legislative definition in question probably reflected accurately enough the consensus of judicial opinion even in England. But at a later day it in some way ceased to embody what the English judges conceived to be the test of a perpetuity. The revised statutes define a perpetuity as the unlawful suspension of the power of alienation,<sup>3</sup> thus making the suspension of the power of alienation the true test of a perpetuity. That this definition was then in accordance with the opinion of distinguished common lawyers there can be no question. Sugden in the year 1811 had stated that "a perpetuity may, at this day, be described to be such a limitation of property as renders it inalienable beyond the period allowed by law,"<sup>4</sup> and this statement he frequently reaffirmed. In his argument in *Cadell v. Palmer* he laid it down as an incontrovertable proposition "that the old law

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<sup>1</sup> R. S. 724, Secs. 18, 19.

<sup>2</sup> 1 R. S. 723, Secs. 14, 15, 16.

<sup>3</sup> 1 R. S. 723, Secs. 14, 15, 16.

<sup>4</sup> Sugden's note to Gilbert on Uses, London Edit. of 1811, p. 260; and see Fearn, C. R., 430; Sanders' Uses and Trusts, I, 196 (Amer. Edit. I, 202).

raised no objection to estates granted in perpetuity provided there was a power to bar them or destroy them so as to render them alienable."<sup>1</sup> In this statement he only conformed to earlier judicial opinion.<sup>2</sup>

At the present day in England and some other jurisdictions the old common law rule against a perpetuity seems to have undergone a subtle change, and it is boldly stated that the object of the rule "is not the prevention of property from inalienability."<sup>3</sup> According to this school of lawyers the rule is one directed against remoteness of vesting, and, consequently, if a future estate vest beyond the period laid down by the rule in question, the limitation containing it is void, even though such estates may be presently barred or aliened by persons in being of their own motion and without resort to courts of judicature.<sup>4</sup> This opinion certainly finds judicial sanction in modern English cases,<sup>5</sup> and yet we detect that earlier conception of a perpetuity which was adopted by the Revised Statutes of New York, emerging in a recent case. In the year 1883 Lord Blackburn distinctly intimated that in his opinion a present power to alienate was inconsistent with the legal notion of a perpetuity.<sup>6</sup> It is not possible that so great a Judge should have been inadvertent on so fundamental a point of law. But whatever the definition may be elsewhere, in New York the Revised Statutes alone determined what is a perpetuity.

Since the Revised Statutes of New York, a present power to alienate is incompatible with a perpetuity.<sup>7</sup> Consequently, no matter how remote a future estate may be in vesting, if it is susceptible of immediate alienation, the statute against perpetuities has no reference to it.<sup>8</sup> What has

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<sup>1</sup> 1 Cl. and F., 372.

<sup>2</sup> 1 Salk, 229; 1 Cha. Ca., 23.

<sup>3</sup> Marsden, Perpetuities, Chap. III.; Gray, Rule against Perpetuities, Chap. VII, and Sec. 600.

<sup>4</sup> Marsden, Perpetuities, Chap. III; Gray, Rule against Perpetuities, Chap. VII.

<sup>5</sup> *In re Hargreaves*, L. R. (43 Ch. D.), 401, 406.

<sup>6</sup> *Withaus v. Vane*, L. R. (9 App. Cas.).

<sup>7</sup> 1 R. S., 723, Secs., 14, 15.

<sup>8</sup> *Murphy v. Whitney*, 140 N. Y., 541, 546; *Williams v. Montgomery*, 148 N. Y., 519, 526; *Stoiber v. Stoiber*, 40 App. Div., 156.

been said is, perhaps, sufficient to indicate that in New York the older legal conception of a perpetuity has survived in practice. That this conception may be carried to extreme lengths, probably beyond the intention of the framers of the Revised Statutes, a recent case only serves to show.<sup>1</sup> But, as the doctrine of that case may yet have "its wings clipped," as the learned Mr. Challis expressed it, when it comes before the final appellate tribunal, it is unnecessary to discuss it in this connection. It is well understood that, by virtue of a provision of the statute which forbids alienation by a trustee, certain express trusts in New York are within the rule against perpetuities.<sup>2</sup> In *Mills v. Mills*,<sup>3</sup> the case in question, the declared trust certainly contravened this rule. But, by virtue of a recent statute, whenever a remainderman assigns or releases his interest to a *cestui que trust* entitled to the income and profits of an intervening trust estate, the *cestui que trust* may now put an end to the trust.<sup>4</sup> In view of this statute, the Court held, in *Mills v. Mills*, in substance, that the trust was without the rule against perpetuities, because the remainderman and the *cestui que trust* were capable, *eo instanti*, of destroying the trust. The trust could not, therefore, be said to suspend the power of alienation.

The Revised Statutes abolished all the old distinctions between uses, executory, devises and legal limitations<sup>5</sup>. Thereafter all instruments of conveyance were subject to the same rules and if a future estate did not violate the revised rule against perpetuities or the new rules regulating the limitations of successive life estates or estates *pur autre vie*, it could hardly fail for technical reasons. No future estate could be avoided on the ground of the impossibility of the contingency on which it was to take effect<sup>6</sup>. Subject to the revised rule against perpetuities only, freeholds might be created to commence *in futuro*; contingent remainders might be limited on terms of years and a fee limited on a

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<sup>1</sup> *Mills v. Mills*, 28 Misc., 633; *affd.*, 50 App. Div., 221.

<sup>2</sup> *Murphy v. Whitney*, 140 N. Y., 541, 546.

<sup>3</sup> 50 App. Div., 221.

<sup>4</sup> Chap. 452, N. Y. Laws of 1893.

<sup>5</sup> 1 R. S. 726, Sec. 42.

<sup>6</sup> 1 R. S. 724, Sec. 26.

fee<sup>1</sup>. These provisions of the statute were so destructive of all the principles formerly regulating the limitation of future estates that they may be said to have created a new science, were it not for the retention of the common law in all cases not expressly provided for by the statute. To harmonize these new rules with the old system of conveyancing has not been without difficulties in practice. But its solution has been satisfactory on the whole and has resulted in a system of conveyancing certainly simpler than that which it superseded. Whether it would not have been desirable to go still farther and abrogate the old law entirely, is the only question which troubles those who have given much attention to the plan and the scope of the Revised Statutes concerning real property.

ROBERT LUDLOW FOWLER.

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<sup>1</sup> 1 R. S. 724, Sec. 24.

## OPINION EVIDENCE.

THERE are few questions in practice more perplexing to courts or that produce more conflict of views than the admissibility of opinions as evidence in the trial of issues of fact. The general principle that witnesses must testify to facts and not inferences or opinions is so deeply rooted and grounded in the judicial and professional mind that it is very difficult sometimes to recognize the exceptions to the rule or to apply them to particular cases. These exceptions as they were outlined and understood in the ancient common law have been much enlarged in our day, or at least applied in practice with greater freedom and liberality. The growth of knowledge and the vast progress attained in every field of human activity must always require the application by the courts of old principles to new conditions. Amid the restless activity and marvelous progress of these days in every department of human exertion, the methods of administering justice and ascertaining truth cannot remain stationary. Knowledge is power and its all-pervading influence must necessarily affect rules for the determination of controverted questions of fact. It cannot be denied that scientific, mechanical and professional knowledge, or even superior knowledge and experience in some matters outside the range of what might be properly called scientific inquiry, are helpful to the common mind in the investigation of matters of fact in judicial proceedings. The rule which permits the courts to make use of such instrumentalities in the administration of justice is open to such great abuses that all opinion or expert testimony has been much discredited on account of the unseemly and loquacious wrangling which results from its introduction, and the tedious and unprofitable length of trials in which it is a feature. But, after all, the objections that have been so often and so forcibly urged to this kind of evidence apply in a great measure to the narration of facts and all human testimony. The witness who testifies to a fact may be ignorant, or interested, or willfully false or mistaken. It is entirely safe to assert that justice is

quite as frequently perverted by a false, mistaken or colored statement of facts from witnesses as it is in consequence of all the objections that have been or can be urged against the opinions of experts, and so, notwithstanding the prejudices of the courts and the profession, and the unfavorable criticism of the public, it may be said the practice of bringing to the aid of the Court or jury expert knowledge of the process of ascertaining the truth concerning certain disputed questions of fact has grown rather than diminished. In this age the knowledge of experts, and, indeed, superior skill or experience, in any of the various walks of life count for much, and there is no good reason why courts should refuse to be aided by such means in the search for truth in proper cases any more than individuals. The fact that testimony of this character is sometimes used to prevent or delay justice, or to protract the investigation, is no argument against its usefulness in proper cases and within proper limitations. The circumstance that the rule has been abused in cases where medical experts or experts in handwriting are called, does not prove that it ought to be abolished or that on the whole it is not a useful one.

It has been often suggested that witnesses who appear as experts to testify to opinions should be appointed by the courts or some public authority. Any safeguards that would secure the independence and impartiality of the witness would, of course, be desirable, but the scheme of creating a body of official experts to be called in when needed would seem to be impracticable. It would, of course, be impossible to select any person with sufficient knowledge of the several professions or vocations in life from which experts may be called who would be qualified to testify in all cases, and, hence, the selection would have to be made for each particular case. It would be very difficult, if not impossible, to formulate any plan for the appointment of experts by the courts or any other public authority that would in practice be found convenient or even practicable. On the whole, it would seem to be wiser to leave the selection of such witnesses to the parties themselves, and the rules under which such testimony is admissible, as well as its real weight and value in all cases, to the good sense and judgment of the courts. An attempt to regulate the practice

in this respect by statute, or any arbitrary rule, would be more likely to aggravate whatever evils now exist than to improve the law. It would be entirely practicable, however, to abolish an evil involved in the practice to which much of the scandal and adverse criticism, of which testimony of this kind is the subject may be attributed. The enormous fees which experts have been permitted to charge for their services as witnesses and which the parties to the litigation are willing to pay them, not only furnishes a strong temptation to the witness to consume valuable time and to becloud the question at issue with theories and suggestions that tend rather to obscure than to bring out the truth, but it destroys the value of their testimony in the minds of the jury. When the compensation is regulated by law and reduced to such moderate limits as to remove the temptation suggested, the professional expert will not appear so frequently, will consume much less time than now, and his opinion will have more weight with the jury. There is something unseemly and scandalous in the present practice, to which not only private litigants, but even public officers resort, of hiring experts by contract, express or implied, to testify in civil and criminal cases. There is no more reason why a person who happens to possess special knowledge upon some subject should not be compelled by the process of the Court to appear and testify in aid of the administration of justice, than there is for relieving him from the duty of serving as a juror, or any other duty which the law enjoins upon the citizen. In this respect the law in its present condition would be greatly improved by judicious legislation.

The general rules under which the opinions of witnesses may be received are now quite well settled and understood. In the first place it must be shown that the witness is qualified by learning, experience or observation to express an opinion upon the question at issue. The qualification of the witness in such cases presents a preliminary question of fact for the determination of the trial Court and when determined upon some evidence is not ordinarily open to review upon appeal.<sup>1</sup> The witness may

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<sup>1</sup>Nelson v. Sun Mutual Insurance Co., 71 N. Y., 454.



express an opinion upon a state of facts that are either within his personal knowledge or observation, or have been presented to his mind by means of a hypothetical question embracing the facts upon which the opinion is to be based;<sup>1</sup> and it is no objection to evidence of this character that the question propounded to the witness is the precise question the jury is to determine<sup>2</sup>. On the contrary, it has been said that this would rather seem to be a good reason for the admission of the testimony. If the witness can add instruction beyond what the jury are able to obtain from the data before them it is no objection that the witness refers to the precise matter in issue.<sup>3</sup>

When it is sought to obtain the opinion of the witness by means of a hypothetical question, it is important that the question should be stated in brief and clear language. Much of the confusion and delay incident to this class of evidence result from the careless and imperfect manner in which such questions are framed. They are frequently framed more with the view of confusing the witness than of eliciting the truth or testing his qualifications, or the correctness of his conclusions. The language is usually involved and spun out to such an interminable length that the witness can seldom comprehend the real meaning of the inquiry, and ever the examiner himself is in doubt as to its real scope and object. The administration of justice would be promoted by some change in the law that would authorize and require the presiding judge to supervise the framing of the question. In that way it could be confined within reasonable and proper limits, expressed in appropriate terms and made applicable to the facts. The court, the witness and the jury would then be more likely to appreciate the true point of the inquiry and the effect of the answer, and thus much valuable time would be saved. It is not at all likely that the courts or the legislature will take any backward steps with respect to the admission of the opinions witnesses in proper cases, and hence it would be desirable to guard against some of the evils of which the

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<sup>1</sup> *Reynolds v. Robinson*, 64 N. Y., 589; *Cole v. Fall Brook Coal Co.*, 159 N. Y., 59.

<sup>2</sup> *Van Wycklen v. City of Brooklyn*, 118 N. Y., 424.

<sup>3</sup> 1 *Greenleaf's Ev.*, § 441, Ed. 1899.

courts, the profession and the public have reason to complain.

The most difficult element in this question, and that which gives the most trouble to the courts, is to determine in what cases and upon what questions or subjects opinions are admissible. Generally, it may be asserted that they are admissible upon all questions involving scientific, professional or mechanical knowledge. They are also admissible in many cases not falling within this classification, where the inquiry involves special knowledge, skill, experience or observation, and generally on questions of value. The cases in which opinions are not admissible are those where the issue involves no question of science, professional knowledge or special skill or observation, but simply matters of common knowledge relating to the ordinary affairs of life, and as to which one person is just as capable of drawing the proper conclusion as the other. In such cases it has often been said that the witness can only state the facts, leaving the conclusion to be drawn by the court or the jury. There is rarely any difficulty in cases that clearly fall within one or the other of the two groups referred to. But between the limits clearly indicated by the lines that mark the cases thus classified is a large disputed territory, the limit of which is very imperfectly defined. It is not always easy to distinguish the questions that are within the domain of common knowledge and observation from those that are not. It often occurs in practice that questions arising in the ordinary affairs of life, and which in some sense are familiar to every one, depend for their solution upon descriptive facts that the witness is unable to express in such a way as to put the jury in his place, so that the correct picture of the transaction will be presented to their minds. The passion of anger or affection for another, or the condition of intoxication, cannot always be described in words without the expression of an opinion, and in such cases it is not objectionable,<sup>1</sup> for the reason that the witness in such cases is better able to draw the correct inference than the jury. There is a large class of questions concerning which it is held that witnesses

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<sup>1</sup> *Blake v. The People*, 73 N. Y., 586, 1 Greenleaf's Ev., *supra*.

may express opinions, although in a large sense they would seem to be matters of common knowledge and observation. Thus it was held that a witness might give his opinion whether threshing machines were constructed in a good and workmanlike manner;<sup>1</sup> whether a cobble stone wall was properly built;<sup>2</sup> whether it was customary to have guards upon draw bridges;<sup>3</sup> whether certain cabinet work was well done and a good job;<sup>4</sup> how much a given field would yield to the acre;<sup>5</sup> whether a scow was seaworthy;<sup>6</sup> whether a test applied to fire hose was a fair one;<sup>7</sup> whether it would be safe or prudent for a tug boat to tug three boats abreast in a high wind upon a bay or arm of the sea;<sup>8</sup> whether tunneling near other property would cause the earth to settle and slide;<sup>9</sup> whether certain soils would resist the percolation of water;<sup>10</sup> whether the walls of a building were sufficient to sustain it;<sup>11</sup> whether the use of machinery on the third floor of a building would have the effect of weakening the walls;<sup>12</sup> whether a staging erected in a specified way can be safely trusted to carry a particular load.<sup>13</sup>

These decisions illustrate a large class of cases that are very near to the boundary line. The cases in which opinions are inadmissible are those where the inquiry is a matter of common knowledge or observation, and are well illustrated by the discussion in *Ferguson v. Hubbell* (97 N. Y., 507). In that case witnesses were permitted to give opinions whether it was a proper time in the year to set fire to a fallow from which the fire spread to the plaintiff's land. That was clearly a question for the jury when all

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<sup>1</sup> *Curtis v. Gano*, 26 N. Y., 426.

<sup>2</sup> *Pullman v. Corning*, 9 N. Y., 93.

<sup>3</sup> *Hart v. Hudson River Bridge Co.*, 84 N. Y., 56.

<sup>4</sup> *Ward v. Kilpatrick*, 84 New York, 414.

<sup>5</sup> *Philips v. Terry*, 2 Abb. Ct., App. Dec., 607.

<sup>6</sup> *Baird v. Daly*, 68 N. Y., 547.

<sup>7</sup> *Chicago v. Greer*, 76 U. S., 726.

<sup>8</sup> *Transportation Line v. Hope*, 95 U. S., 297.

<sup>9</sup> *Clark v. Willett*, 33 Cal., 534.

<sup>10</sup> *Buffum v. Harris*, 5 R. I., 243.

<sup>11</sup> *Cont. Ins. Co. v. Pruitt*, 65 Tex., 125.

<sup>12</sup> *Turner v. Hoar*, 114 Mo., 345.

<sup>13</sup> *Prendible v. Mfg. Co.*, 160 Mass., 131.

the facts and circumstances had been disclosed, and it is seldom that any controversy will arise in so plain a case. The trend of judicial decisions in recent times is in the direction of more liberality in admitting opinion evidence. When the question is of such a character that a court or jury may be aided by the learning and skill of experts, or by superior knowledge and experience concerning the matter in controversy, even though in a general sense the inquiry may not relate to a subject within the domain of science, the opinion of a qualified witness is generally admissible. It frequently happens in practice that the facts which surround the question are so complicated or indistinct that the jury may not be able to grasp them or to draw the proper inference. In such cases a competent expert will be better able to comprehend the real situation and thus his opinion is helpful in the solution of the question.

The consensus of judicial opinion is decidedly unfavorable with respect to the force or value of this species of evidence, and undoubtedly it is open in this respect to all the criticism that it has received from the courts. In many cases the witness, from causes that have been mentioned, becomes an interested partisan on the side of the case to which he owes his employment and is generally confronted with one equally interested on the other side. In the conflict of opinions that generally follows, the jury frequently find their way out of the difficulty by disregarding all evidence of this character. It is discredited from the beginning largely in consequence of the means by which it has been obtained. It remains true, however, that if the abuses incident to the presentation of such evidence could be removed, the opinion of a capable and disinterested expert would frequently be of great value in the investigation of questions of fact. It would be much easier and wiser to root out these abuses than to dispense with this kind of evidence altogether.

DENIS O'BRIEN.

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## NOTES.

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ADMIRALTY COURTS—EFFECT OF STATE DECISIONS—LIABILITY OF MUNICIPAL CORPORATIONS FOR THE NEGLIGENCE OF THEIR FIRE-TUGS.—The Supreme Court of the United States by a majority of one has decided that a municipal corporation is liable in a court of admiralty in a suit *in personam* for the negligence of one of its fire-tugs whether it is liable in the courts of the State where the tort occurred or not—*Workman v. The Mayor, etc., of New York*, 21 Supreme Court Reporter, 212. The majority opinion is based on the ground that a United States court of admiralty, administering, as it does, a system of law peculiarly its own, and having by the constitution an exclusive jurisdiction (Art. 3, § 2), is never bound to apply local law, as the United Courts of Common Law and Equity, which enforce the same system of law as the State courts, often have to do. For this reason the Court holds that an admiralty court is not bound by *Detroit v. Osborne*, 135 U. S., 492, which held the local law of municipal corporations applicable in United States courts of common law. This view of the freedom of admiralty courts is fully borne out by the cases—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S., 397 (1889); *Buller v. Boston & S. S. S. Co.*, 130 U. S., 527 (1889); *The Max Morris*, 137 U. S., 1 (1890), *The J. E. Rumbell*, 148 U. S., 1 (1893). Mr. Justice White, who writes the majority opinion, then goes on to show that the logic of the maritime law cannot conceive of a legal person, *capable of being sued*, whose liability for a tort in a particular instance depends on the nature of the act which produces the injury. On page 219 he says: "It results that in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity

from liability in a court of admiralty where the Court has jurisdiction. This being so, it follows that as the municipal corporation of the City of New York, unlike a sovereign, was subject to the jurisdiction of the Court, the claimed exemption from liability, asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such a claim for the purpose of the case be conceded—was without foundation in the maritime law and, therefore, afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.”

The dissenting Judges say they know of no case where an action of tort is maintainable in admiralty when there is no liability at common law, having in the preceding paragraph quoted *The Max Morris* (*supra*) and *Atlee v. Northwestern Union Packet Co.*, 21 Wall., 389 (1874), as cases where in admiralty contributory negligence of the plaintiff was no defence. They quote *the Harrisburg*, 119 U. S., 199 (1886), as illustrating their position. That case held that the rule of non-survivorship of tort actions should be the rule of admiralty as well as the common law. But Chief Justice Waite adopted the common-law rule in that case because it was a good working rule, and because no admiralty precedents bound him. He nowhere states that he felt himself under compulsion to follow the common law. Granting that in the principal case there were no admiralty precedents (though the majority of the Judges states that there were), the fact that Chief Justice Waite, when he was not bound to do so, chose a universal common-law rule for the admiralty law, is no reason why under other circumstances and when equally free the Court should choose a local rule of State law. Later on the minority say (page 227): “The authority of the fire department and its members as to both kinds of property (buildings and ships) is derived from the municipal and not from the maritime law. Might not this be a very good reason why the maritime law should not recognize such authority or at least any accompanying immunity?”

The result of the decision is to establish a uniform rule for the admiralty courts of the United States, a rule commendable not merely for its universality, but for its justice. It will not hamper the efficiency of fire-tugs, for they will not be liable save for lack of proper care *under the circumstances*, and part of those circumstances to be taken into consideration is the emergency in case of fire and the necessity for great promptness of action. It is to be noted that the Court does not decide that an action *in rem* with its inevitable attachment would lie against the vessel. That point is reserved. When the injury by a fire-tug is negligent and unnecessary, why should the city, its owner, not be held, provided the danger to public interests which an attachment of the boat might cause, is avoided? The argument of the minority was for the application of a harsh and unjust rule when neither precedent nor expediency demanded it. That the Court should have rejected their argument is a distinct step in the right direction.

**BANKRUPTCY—JURISDICTION—RECOVERY OF PROPERTY—ADVERSE CLAIMANTS.**—The trustee succeeds to the title to fraudulently conveyed property of the bankrupt, and is under duty to reduce it to possession, and then to money—Sections 47(2), 67, 70. But as to the particular court in which he may seek its recovery, the act of 1898 is not very explicit. Section 23 confers upon the Circuit Court jurisdiction in suits between the trustee and adverse claimants. In the Act of 1841, Section 8, and in the Act of 1867, Section 2, the District Court was given concurrent jurisdiction. In *Bardes v. Bank*, 4 Am. B. R., 163 (1900), Justice GRAY decided that the act of '98 gave no such jurisdiction to the District Court, thus abrogating the theory of such jurisdiction on the ground of the original bankruptcy jurisdiction of the District Court under Section 2, (4), (6), (7). Consequently an assignee cannot be compelled to deliver property to the trustee by decree of the latter court, notwithstanding *Davis v. Bohle*, 1 Am. B. R., 412 (U. S. C. C., 8th Circ., 1899). In *re Gutwillig*, 1 Am. B. R., 388 (U. S. C. C., 2d Circ., 1899), and many other District and Circuit Court decisions.

A suit to recover property from an adverse claimant is not a suit in bankruptcy, but is independent of the bankruptcy proceedings, though it results therefrom. The object of Congress was to throw into State courts as many of such suits as possible. *Shoshone Mining Co. v. Rutter*, 177 U. S., 505 (1899).

It is, however, essential to determine what is an adverse claimant. The term signifies more than a refusal to obey the decree of the District Court; otherwise, any holder of property of the bankrupt could, by his contempt, oust the District Court of jurisdiction. In *Eyster v. Gaff*, 91 U. S., 505 (1875), MILLER, J., considered an adverse claimant one who contested the right to personal or real property with the bankrupt. In *Lathrop v. Drake*, 91 U. S., 516 (1875), BRADLEY, J., treated as adverse claimants those parties only who claim an adverse interest. GRAY, J., in *Bardes v. Bank*, *supra*, speaks of the adverse claimant as asserting a title. In all the cases an adverse claim is taken to mean some claim of lien, property interest, or color of title, which is to be adjudicated in a plenary suit. Accordingly, one who asserts no title, claims no interest, or sets up no adverse right, cannot avail himself of Section 23. It is within the jurisdiction and power of the District Court to decree a transfer or delivery by him on pain of contempt. In *re Morse*, 5 Am. B. R., 151 (Va., 1900). Similarly, a mere gratuitous bailee is amenable to such a decree of the District Court. True, the bankrupt himself would have been forced to resort to an action at law to regain possession, but this fact is not decisive. The Court which applied it as a test, in *re Nugent*, 5 Am. B. R., 176 (Ky., 1901), seems to have attached undue importance to the words in Section 23, which place the trustee in the position to bring all suits which the bankrupt could have brought. This provision marks the extent of power in the trustee where there are adverse claimants, but does not purport to define an adverse claim. *White v. Schloerb*, 4 Am. B. R., 178 (U. S. C. C.,

1900). Consequently, a contumacious refusal to deliver over goods or money of the bankrupt which the District Court finds in the hands of another, who simply denies the possession, should not compel a trustee to have recourse to the State or Circuit Courts for redress.

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**BANKRUPTCY—LIFE POLICY—PREMIUMS AS PROPERTY TRANSFERRED.**—When an insolvent continues to pay premiums on a policy of which his wife is the beneficiary, are the premiums paid to be considered property transferred in fraud of creditors, and to be recoverable by the trustee? In a recent English case, *In re Harrison*, II. Q.'s B. 710 (1900), the English Act of 1883, Section 47, enabling a trustee to avoid any "settlement," made within ten years, but during insolvency, was found not to embrace such premiums. A Court which takes the ground that debentures given by an insolvent father to a son who used them in working up a profitable business do not constitute "a settlement" within the act, *In re Plummer* II. Q.'s B., 790 (1900), could not consistently consider this payment of premiums a "settlement." That term is defined as a transfer by which the money or the proceeds are to be retained in the hands of a donee, or are in such form that they can be traced, *In re Tankard* II. Q's. B., 57 (1899), at page 60, *In re Player*, L. R., 15 Q.'s. B. D., 682 (1885). Now, each premium goes to maintain the whole policy, and no one premium can be said to represent a particular part of the policy or the insurance during a particular year. *New York Life Ins. Co. v. Statham*, 93 U. S., 24 (1876), *In re Anchor Ins. Co.*, 5 Chan., 632 (1870), at page 638. It may no more properly be contended that the premiums for ten of the twenty-two years during which they were paid existed in the insurance money, than that the debentures existed in the son's business. RIGBY, L. J., *In re Plummer*, pp. 800, 808. If the particular preceeds must be shown to represent the gift, *In re Vansittart*, 1 Q. B., 181 (1893), neither of these cases falls within the category of "settlements." *Holt v. Everall*, 34 Law T. (N. S.), 599, for a construction of the English Act of 1868. Under the U.S. Act of 1898, when an insolvent has paid premiums during the four months' period on a policy having no cash surrender value to himself, and payable only to his wife, the trustee in bankruptcy has no rights as regards these premiums, (*In re Slingsduff*, 5 Am. B. R., 76, (Md., 1900,) unless the Insurance Co. had actual or constructive notice of the fraud. *Central Bank v. Hume*, 128 U. S., 195 (1888). Otherwise the creditors are powerless. *Morris v. Dodd*, 36 S. E., 83, (Ga., 1900). Now when the insolvent not only becomes a bankrupt but dies, why should the creditors acquire additional right? It cannot be upon the ground of benefit enuring to the wife, for in such cases a charge upon her property, as for the cost improvements defrayed by the insolvent, rests upon the theory of her request or participation. *Seasongood v. Ware*, 104 Ala., 212 (1894), *Isham v. Schaffer*, 60 Barb., 317 (1871). A mere volunteer can-



not charge a party as his debtor. *Humphrey v. Spencer*, 36 W. Va., 11 (1892), inconsistently concludes that a wife's participation in the fraud is requisite to set aside a deed of property given by her insolvent husband, but immaterial to charge the property for the improvements erected by him. True, *Merchants, etc., v. Borland*, 53 N. J. Eq., 282 (1895), permits a recovery of premiums from the wife, but it is on the ground that the case is the same as though the husband had deposited money in a savings bank to the wife's credit—a refusal to recognize the indivisibility of the policy. But, what the result would be in a particular jurisdiction as regards premiums paid by an insolvent, would depend entirely upon the State law of fraudulent transfers, U. S. Bank Art., Sect. 67 (2), or upon the Statutes; Section 22, N. Y. Domestic Relations Law. Maryland Code, Art. 45, Sects. 8, 9, 10. Under Section 70 of the '98 act alone, the trustee could not pursue these premiums, and could not charge the insurance money in the wife's hands.

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CONSTITUTIONAL LAW—TAXATION—TAX ON GROSS EARNINGS AS AN EXEMPTION.—It is a well-settled rule in interpreting our State Constitutions that a provision that "all property shall be taxed in proportion to its value," or, "taxation shall be uniform and equal throughout the State," does not prevent the Legislatures from exempting certain classes of property, wholly or in part, from taxation. *Am. & Eng. Cyc. of Law*, XXV, 61 n. 4; *Mobile & Ohio R. R. v. Tennessee*, 153 U. S., 486 (1893). In States which have such a constitutional provision (*e. g.*, Wis., Ill., Ia., Mo., Kan.) the rule of *Farrington v. Tennessee*, 95 U. S., 679 (1877), would apply, viz., that where a tax of a fixed percentage of its earnings has been imposed on a corporation in lieu of all other taxes forever, and acts are done on the faith of this offer, a contract arises in favor of the corporation irrevocable by the State. Besides a clause like that given above, the Constitution of Minnesota also contained a provision against exempting property from taxation (Const. of 1858, Art. 9, Sec. 3). It had been frequently held by the State courts that a gross earnings percentage tax was valid for a particular year notwithstanding this clause. But the question had never been raised under this clause as to the validity of a contract forever to exempt corporations from general taxes in return for a fixed percentage of the annual gross receipts. The Legislature never tried to change the rate per cent. per annum, or to impose a tax of a different kind. The question finally arose, however, in *Stearns v. Minnesota ex rel. Marr*, 21 Sup. Ct. Rep., 73 (December 3, 1900). An act had been passed in 1895 (L. of Minn., Ch. 168) levying an *ad valorem* tax on lands belonging to a railroad company which had previously enjoyed immunity from general taxation. The act was declared unconstitutional by the U. S. Supreme Court. A majority of the Judges seemed to think that a special constitutional amendment (passed in 1871), regarding railroad taxes, validated the unalterable contract for perpetual commutation of general taxes in return for a fixed per-

centage of the gross receipts. The question is probably settled in Minnesota so far as railroads are concerned. But the question still remains open for other corporations, enjoying privileges under the gross receipts tax system, whether the present or any future Legislature can raise the rate per cent. of their annual tax, or substitute for it an *ad valorem* tax. On this point the opinion of Mr. Justice WHITE (speaking for HARLAN, GRAY and McKENNA, J.J.), is important. He says: "The moment it is admitted that a gross receipt tax is an irrevocable contract, thereby it necessarily results that an exemption is provided for. The object of forbidding exemptions from taxation is not alone to secure revenue, but is to preserve untrammelled by contract the fulness of all the lawful power of taxation in the successive repositories of such power."

This reasoning seems sound. It is one thing to say that a gross-receipts tax for a given year is not an exemption; and quite another thing to say that a contract whereby future legislatures are kept from exercising their discretion, as to equalizing the general burden of taxation and readjusting the scheme of taxes when burdens become misplaced, does not render possible the development of a great system of exemptions. Such a contract would take away from the courts the right in any one year to consider whether the Legislature had abused its discretion in choosing the method of securing equalization and preventing exemptions, and only through the courts can clauses in a constitution providing for "equal and uniform taxes" "without exemptions" be enforced. Such a contract should, therefore, be declared void from its inception under a clause against exemptions.

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REGULATION OF COMMERCE, THE POLICE POWER, AND THE ORIGINAL PACKAGE RULE.—By its decision in the case of *Austin v. Tennessee*, 21 Sup. Ct. Rep., 132 (November 19, 1900), the United States Supreme Court has come very near to overruling certain of its decisions vitally affecting the interpretation of our Federal Constitution. The Court here held that a State could prohibit the sale of cigarettes, and then punish a man who imported them in packages of ten and sold these packages singly. The packages were taken by an express company from a loose pile in a factory outside the State, were transported in an open basket belonging to the company, and delivered to the importer at his place of business, being first taken out of the basket by the express company's agent. Obviously, this was a subterfuge to evade the State statute. But was not the importer protected under the interstate commerce clause of the Constitution? Four Judges of the Court, speaking through Mr. Justice BROWN, denied that he was. They conceded that cigarettes were a legitimate article of commerce, and that the real question in the case was the definition of the term "original package" under the rule which protects the sale of original packages by the importer. Was it the package in which the importation was actually made, or a package of the size of those "in which *bona fide* transactions are

carried on between the manufacturer and the wholesale dealers residing in different States"? Mr. Justice BROWN adopted the latter view; the essential term of which is *bona fide*, i. e., good faith in regard to State statutes prohibiting the sale of certain articles to consumers. According to this definition, therefore, in the absence of legislation by Congress, no package can be an "original package" which is small enough to be purchased by a consumer in attempted evasion of the State statute. So that, in effect, Mr. Justice BROWN imposed the following limitation on the "original package" rule: In the absence of express affirmative legislation by Congress, whenever the sale of an original package by the importer becomes a sale to the consumer, freedom of interstate traffic gives way to police regulations of the State, even though the article sold be recognized as a legitimate subject of commerce. The dissenting opinion of Mr. Justice BREWER (FULLER, C. J., SHIRAS and PECKHAM, J. J., with him) insisted, that, since Congress has the exclusive regulation of commerce, it could, if it chose, prescribe a large form of cigarette package for the interstate trade; but if it remained passive it left the matter to the determination of the importer. The basis of this latter contention was the doctrine summed up by BRADLEY, J., in *Robbins v. Shelby County Taxing Dist.*, 120 U. S., 489, 493 (1887), "Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions." Apparently, according to Justices BROWN, HARLAN, GRAY and McKENNA, the power of Congress to regulate interstate commerce is not exclusive, but until Congress has specifically defined what shall constitute an "original package" entitled to protection under the constitution, the State has a right to define the term, by virtue of its police power, and say what size of package importers must adopt. Yet, by the cases of *Leisy v. Hardin*, 135 U. S., 100 (1889), and *Schollenberger v. Pennsylvania*, 171 U. S., 1 (1899), the point seemed clearly settled the other way.

How, then, stands the law? In *Austin v. Tennessee*, the Judges were divided four to four. Mr. Justice WHITE cast the deciding vote. He held as against all his colleagues, on the mere question of fact, that the package here actually imported was the basket, not the package of ten cigarettes. The vital questions raised by the other eight judges are not discussed by him. This case, therefore, leaves the law in a most unsettled and unsatisfactory condition.

## RECENT DECISIONS.

**ADMIRALTY COURTS—EFFECT OF STATE DECISIONS—LIABILITY OF MUNICIPAL CORPORATIONS FOR THE NEGLIGENCE OF THEIR FIRE-TUGS.** *Held*, that in admiralty municipal corporations are liable in suits *in personam* for the negligence of their fire-tugs whether liable in the State courts or not. *Workman v. The Mayor, etc., of New York*, 21 Supreme Court Reporter 212 (December 24, 1900). SEE NOTES.

**BANKRUPTCY—LIFE POLICY—"SETTLEMENT."** By post-nuptial settlement in 1877 the assured assigned policies to trustees for his wife and children, and continued to pay premiums on them, though from 1889 to 1899 he was insolvent. Just after a receiving order in bankruptcy he died; and the trustee in bankruptcy seeks to recover out of the insurance money in the hands of the trustees for the wife the premiums paid during the ten years of insolvency. *Held*, these premiums are not a "settlement" under Section 47, Act 1883, since no proportionate part of the insurance money is represented by the payment of the particular premiums. *In re Harrison*, II Q. B. 710 (1900). SEE NOTES.

**BANKRUPTCY—JURISDICTION—RECOVERY OF BANKRUPT'S PROPERTY.** The bankrupt, just prior to filing his petition, paid over to his wife money and property, the receipt of which she admits, but which she refuses to return to the trustee. *Held*, the District Court has power summarily to compel her to turn over the money and property to the trustee. *In re Moore*, 5 Am. B. R. 151 (D. C. Va., 1900). SEE NOTES.

**BANKRUPTCY—JURISDICTION—ADVERSE CLAIMANT.** A bankrupt father paid to his son money which should have gone to his estate, but the receipt of which the son denied, although the payment was established. *Held*, since the bankrupt could not have recovered the money except by a suit at law, the District Court had no jurisdiction to compel its repayment by contempt proceedings, for the son is to be considered an adverse claimant under Section 23. *In re Nugent*, 5 Am. B. R. 176 (C. C., 6th Circuit, Ky., 1901). SEE NOTES.

**BANKRUPTCY—PROVABLE DEBT—STAY OF SUIT ON UNLIQUIDATED CLAIM.** *Held*, an unliquidated claim for breach of contract that might have been liquidated and proved under Bankr. Act 1898, § 63 b, but which was voluntarily withheld till expiration of time for proving claims, is a provable debt from which bankrupt will be discharged under Sect. 17, and he is entitled to an order staying suit in State court as provided in Sect. 11. *In re Hilton*, 104 Fed. 981 (D. Ct., S. D. of N. Y., Nov., 1900).

To allow a creditor voluntarily to withhold and thereby preserve such a claim, as against subsequently acquired property, would be to defeat the object of the act.

**BANKRUPTCY—VALUABLE POLICY WITHOUT SURRENDER VALUE.** The life policy of a bankrupt, by which \$7,000 at the end of two years more is payable to himself if he lives, to his wife if he dies meantime, but having no cash surrender value, is *held* to pass to the trustee as property of the bankrupt, since Section 70 is not limited to policies having a cash surrender value, but applies to all the bankrupt's property. *In re Slingduff*, 5 Am. B. R. 76 (Md., 1900).

This policy represents an interest, though contingent, of the bankrupt, valuable because almost matured. Hence a trustee may keep it alive if he deems it valuable to the estate. The bankrupt could have assigned his interest; therefore it is property, and as such passes to the trustee.

Sect. 70 (5). *In re William Diack*, 3 Am. B. R. 723 (S. D. C. N. Y., 1900). *In re Boardman*, 4 Am. B. R. 620 (D. C. Mass., 1900). The *proviso* in Sect. 70 (5) is merely a privilege given to the bankrupt to redeem from the trustee such policies as have a surrender value payable to the insured. The intimation by the Court, however, that if the trustee collects the insurance money he may keep only the amount which the policy was worth at the date of adjudication plus the premiums paid by him during the remaining two years, seems unfounded. Had the bankrupt assigned it to a third party, the latter would, at the end of the term, hold for himself all the insurance money. Whatever property the bankrupt had would have passed by the assignment. If it is only because of this property that the trustee takes; why does he not take this whole property, just as an assignee of the policy would? So long as the debts are unpaid the creditors have an insurable interest in the life of a bankrupt; after the bankrupt law has discharged him from personal liability this interest is not lost. *Conn. Mut. Life Ins. Co. v. Schaeffer*, 94 U. S. 457 (1876). That interest is the amount of the debt plus the cost of maintaining the policy. Thus, if the debts are more than the amount of the policy, the creditor's interest covers the whole insurance money.

**BILLS AND NOTES—AMBIGUITY—PAROL PROOF.** The note read, "we promise to pay," above it was printed the name of a corporation, and it was signed "R. J. B., President." *Held*, parol evidence admissible to show that it was the note of the corporation. *Second National Bank of Akron v. Midland Steel Co.*, 58 N. E. 833 (Ind., Dec. 13, 1900).

The rule that the Court must determine from the face of the instrument alone who is liable has led to much confusion. In Massachusetts, in cases where a corporation name appeared on the margin of the instrument, the Courts have held the corporation liable. *Fuller v. Hooker*, 3 Gray 334 (1855); *Carpenter v. Farnsworth*, 106 Mass. 561 (1871). In New York, upon similar facts, the opposite result has been reached. *Casco National Bank v. Clark*, 139 N. Y. 307 (1893); *First National Bank v. Wallis*, 150 N. Y. 455 (1896). The principal case represents the better doctrine, that where there is an ambiguity on the face of the instrument parol evidence should be admitted, not to contradict, but to explain the real meaning thereof. *Reeve v. First National Bank*, 54 N. J. L. 208 (1891); *Bean v. Pioneer Mining Co.*, 66 Cal. 451 (1885).

**BILLS AND NOTES—LIQUIDATED DAMAGES.** Upon a note made in Colorado, payable five years from date in New Hampshire, with 6 per cent. interest, or 12 per cent. upon default of principal or interest, the fifth year's interest was not paid. *Held*, this was a valid contract for liquidated damages. *Eccles v. Herrick et al.*, 62 Pac. 1040 (Colo., Dec., 1900).

Whether a stipulated sum can be recovered as liquidated damages or the stipulation is void as a penalty is not determined by the bare words of the argument. *Kemble v. Farren*, 6 Bing. 141 (1829); *Lampman v. Cochran*, 16 N. Y. 275 (1875); but in the light of the intention of the parties and the surrounding circumstances, *Sainter v. Ferguson*, 7 C. B. 716, 728 (1849). The intention to fix a penalty is inferable in law when the contingencies vary greatly in importance; *Bignall v. Gould*, 119 U. S. 495 (1886); but see *Wallis v. Smith*, 21 Ch. D. 243, 264 (1882); and generally, unless the thing contracted for is of such a nature that it would have been impossible to determine beforehand with reasonable accuracy what damage would result from a breach. *Lynde v. Thompson*, 2 Allen, 456 (Mass., 1861); *Little v. Banks*, 85 N. Y. 258, 266 (1881). When the payment of a smaller sum is secured by a larger, the stipulation is for a penalty. *MAYNE, Damages*, 148 (1894), and authorities cited. The present case is within the authority of *McKay's Estate v. Bank*, 59 Pac. 745 (Colo., 1899), and finds support in *Wilkerson Daniels*, 1 Greene, 179, 188 (Iowa, 1848), and *Finger v. McCaughey*, 114 Cal. 64 (1896), but it seems wholly inconsistent with any effective recognition of the principle, which has never been doubted (see all cases *supra*), that, upon suit for a stipulated penalty, recovery can be had only for the amount of actual damage. *Betts v. Burch*, 4 H. & N. 506, 510 (.859).

**CARRIERS—ROUND TRIP TICKET.** The plaintiff received from her brother a ticket, with the contract printed on its face, limiting the time, and had no information as to the contract other than what appeared on the ticket. *Held*, the contract on the ticket was binding, and parol evidence of the brother as to what occurred at the time of buying the ticket was not admissible. *Walker v. Price*, 62 Pac. 1001 (Kansas, Dec., 1900).

This evidence was promptly refused as contradicting the written contract. *Rogers v. Perrault*, 41 Kan. 385 (1889); *Willard v. Ostrander*, 46 Kan. 591 (1891). There is authority for the doctrine that one who avails himself of such a contract is bound by stipulations expressed in it, whether read or not. *Fonseca v. Steamship Co.*, 153 Mass. 553 (1891). The right to be carried under the contract is limited to the time specified. *Hutchinson on Carriers* and cases there cited. It might well have been held in the principal case that the plaintiff's brother in purchasing the ticket acted as agent for the plaintiff, and that the plaintiff was entitled to rely on the representations of the defendant's ticket agent, so that the stipulations limiting the time did not constitute the contract of carriage.

**CHattel MORTGAGE—EXISTING GOODS—POTENTIAL EXISTENCE.** Lessees of a brickyard and clay pit gave a mortgage on the bricks then in the yard and on those to be manufactured from the clay. *Held*, this was a good mortgage as to the bricks then made, but not as to those made afterward. *Townsend Brick and Contracting Co. v. Allen*, 62 PAC. REP. 1008 (KAN., Dec., 1900).

The case is correct. There can be no present sale of goods to be manufactured thereafter. *Langton v. Higgins*, 4 H. & N. 402. The case is put on the ground that the bricks had no potential existence, the Court citing *Long v. Hine*, 16 Pac. Rep. 339 (Kan., 1888), and *Cole v. Kew*, 26 N. W. 598 (Neb., 1886). These two cases hold that crops not planted have no potential existence. On this point the cases differ. *Watkins v. Wyatt*, 9 Baxter 50 (Tenn., 1877); *Minn. Linseed Oil Co. v. Maginnis*, 20 N. W. (Minn., 1884); *Argues v. Arson*, 51 Cal. 600 (1887), are contrary. *Cressy v. Sabre*, 17 Hun, 120 (N. Y., 1879); *Cudworth v. Scott*, 41 N. H. 456 (1860); *Giddings v. Nelson*, 86 Ill. 591 (1877); *Rochester O. Co. v. Rassey*, 142 N. Y. 570 (1894); *Merch. Bank v. Lovejoy*, 84 Wis. 601 (1893), are in accord. *Grantham v. Hawley*, Hobart 132 (1603), the early English case on the point, suggests no such limitation.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORIGINAL PACKAGE RULE.** A law of Tennessee (acts of 1897, Chap. 30) made it a misdemeanor to sell cigarettes in the State. Plaintiff in error imported cigarettes in packages of ten. He sold a package and was convicted under the statute. *Held*, the conviction was valid, since a package of ten cigarettes was not an "original package." *Austin v. Tennessee*, 21 Sup. Ct., Rep. 132 (Nov. 19, 1900). SEE NOTES.

**CONSTITUTIONAL LAW—TAXATION—TAX ON GROSS RECEIPTS—STATE AS TRUSTEE OF CONGRESSIONAL LAND GRANTS.** The Minnesota constitution contained a clause prohibiting exemptions from taxation. Contracts were made by which certain railroad corporations were to be forever free from general taxes, in return for a percentage of their annual receipts. *Held*, these contracts were constitutional and unalterable; (a) because made in regard to trust lands granted by Congress to the State to encourage railroad building, which lands never became part of the general taxable domain of the State covered by the clause prohibiting exemptions; (b) owing to the validation of said contracts by the constitutional amendment of 1871. SEE NOTES.

**CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS.** A negro convicted by a jury of white men appeals on constitutional grounds, showing that the commissioners had crossed the names of all negroes from the jury lists. *Held*, that the appellant had been denied the equal pro-

tection of the law and that the trial court was in error in refusing to quash the indictment. *Whitney v. State*, 59 S. W. 895 (Texas, 1900).

This decision is distinctly in accord with the dicta of the court in *The Slaughter House Cases*, 16 Wall. 36, 81 (1872), and with the decisions of the Supreme Court since that time. The right guaranteed the accused in regard to the selection of jurors may be characterized as follows: It is not necessary that some of the jurors be negroes nor that they be selected from a list containing the names of negroes, but if because of their race negroes are excluded from either the jury or the lists by the legislature, or by judicial or executive officers, the rights of an accused negro have been infringed. *Virginia v. Rives*, 100 U. S. 313, 322 (1879); *Meal v. Delaware*, 103 U. S. 370 (1880); *Gibson v. Miss.*, 162 U. S. 565 (1895); *Smith v. Miss.*, 162 U. S. 592 (1895). In these cases the interpretation of a federal statute was primarily involved, but the dicta were followed in the recent case, *Carter v. Texas*, 177 U. S. 442, 447 (1899), where the point at issue was the same as in the principal case.

**CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY.**—After a criminal prosecution had begun, the Court dismissed a juror, who said he was ill, and proposed to defendant that another be selected and testimony be begun anew. Defendant gave no answer, whereupon the Court discharged the jury, and subsequently empaneled a new one. A plea of former jeopardy being entered, the Court refused to hear evidence as to whether the discharge of the jury was proper. *Held*, erroneous. *Bland v. State*, 59 S. W. 1119 (Texas, 1900).

The case is in harmony with the leading decisions. Jeopardy begins with the swearing of the jurors, and procedure upon a valid indictment. "After jeopardy has once so attached, *if, without lawful authority*, the trial Court discharges the jury without the defendant's consent, and before verdict, defendant cannot legally be tried again for the same offense." *Powell v. State*, 17 Tex. Cr. App. 345 (1884); *Pisano v. State*, 20 Tex. Cr. App. 139 (1886). When a juror becomes too ill to proceed, the Court may select another, or an entirely new jury may be selected. *The People v. Stewart*, 64 Cal. 60 (1883); *Ellison v. State*, 12 Tex. App. 557 (1882). This does not of itself support a plea of former jeopardy, but the action of the Court is always open to review, so that evidence that the Court has abused its discretion is admissible under a plea of former jeopardy. *Bishop's New Crim. Procedure*, Vol. I, § 948.

**DOMESTIC RELATIONS—ALIMONY—FOREIGN JUDGMENT.**—A decree of divorce rendered in another State granted alimony at a fixed rate per year until further order of the Court. Plaintiff seeks to recover instalments overdue. *Held*, that defendant cannot plead to the merits of the original action, the judgment being *res adjudicata* under the Federal Constitution (Art. 4, § 1), declaring that full force and credit shall be given in each State to the judicial proceedings of other States. *Arrington v. Arrington*, 37 S. E. 212 (N. C., Nov., 1900).

There is no question as to the extra-territorial force of a judgment declaring a defendant to be indebted in a fixed sum at the date of its entry. Wharton, *Conf. Laws*, § 805. When, as in the principal case, a provision for alimony is subject to the future discretion of the Court, the judgment would seem to lack the conclusiveness necessary to bring it within the protection of the Constitution. *Lynde v. Lynde*, 162 N. Y. 495 (1900). There is a dictum *contra* in *Barber v. Barber*, 21 How. 582 (U. S. Sup. Ct., 1858).

**DOMESTIC RELATIONS—CONFLICT OF LAWS—VALIDITY OF MARRIAGE.**—The Tennessee Code provides that the guilty party divorced for adultery shall not marry the co-respondent during the lifetime of the other party. After an absolute divorce in that State the guilty husband and his paramour took up their residence in Texas and there intermarried. *Held*, that the marriage, though good in Texas, is void in Tennessee, on the ground of public policy. *Newman v. Kimbrough*, 59 S. W. 1061 (Tenn., 1900).

This decision is opposed to the great weight of authority. By private international law a marriage valid where contracted is valid everywhere, unless the union be opposed to natural law, and hence regarded as vicious by the common consent of nations. That the marriage is contrary to the laws or public policy of the jurisdiction in which the question arises is not sufficient. *Sutton v. Warren*, 10 Met. 451 (Mass., 1845). And a State cannot question the validity of a marriage contracted by its citizens in another State on the ground that it was entered into with a purpose to evade a prohibitive statute. *Medway v. Needham*, 16 Mass. 157 (1819); *Van Voorhis v. Brintnall*, 86 N. Y. 18 (1881), unless provision is made for the extension of the marriage laws over citizens abroad.

**EQUITY—INJUNCTION—RESTRAINING PUBLICATION OF A LIBEL.**—The defendant threatened to continue the publication of libelous articles in his newspaper. Injunction refused. *Balliet v. Cassidy*, 104 Fed. 704 (November, 1900).

It is clearly recognized that equity has no jurisdiction to restrain the publication, in general, of libelous articles. *Boston Dialite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *Kid v. Horry*, 28 Fed. 773 (1886); *Car Wheel Co. v. Bemis*, 29 Fed. 95 (1886). Some Courts have taken the stand that the exercise of such jurisdiction would be an infringement upon the liberty of the press. *Brandeth v. Lance*, 8 Paige 24 (N. Y., 1839). Publication has been restrained only to protect a right of property, as in *Gee v. Pritchard*, 2 Swanston 402 (1818), though it is probable that courts of equity are coming to recognize a distinct right of privacy. *Schuyler v. Curtis*, 64 Hun. 594 (N. Y., 1892); reversed on other grounds in 147 N. Y. 434 (1895).

**EVIDENCE—RES GESTÆ RULE.**—Action to restrain nuisance. *Held*, testimony by plaintiff's janitor that tenants when they left stated to him they did so on account of smell from defendant's cheeses was not admissible. *HATCH and INGRAHAM, JJ.*, dissenting. *Smith v. Crawford*, 67 N. Y. Supp. 541 (App. Div., 1st Dept., Dec., 1900).

*Gresham Hotel Co. v. Manning*, Irish Rep., 1 C. L. 125 (1867), accords. *Held*, act without declaration no evidence of fact in controversy, hence union of two cannot render them legal evidence. But in *Hine v. Railroad Co.*, 149 N. Y. 154 (1896), on all fours with case at bar, *held, contra*; competent to show that tenant refused to remain unless rent were reduced, and his statement at the time of his reason for leaving was admitted as part of the *res gestæ*. Rejected testimony would seem admissible within rule of *Waldele v. Railroad Co.*, 95 N. Y. 274 (1884). If tenants left, the fact could be testified to by any one with knowledge of it as tending to prove existence of actionable nuisance and amount of damage. Hence, the act was in itself logical and competent evidence, the statement one made at the time, calculated to explain its character, and so connected with it as to form one transaction and to derive credit from the act itself. (See also *Greenleaf on Evidence*, 16th Ed., § 108.)

**FEDERAL COURTS—RELEASE—IMPEACHMENT.**—Rev. Stat., § 914. A written release executed by the plaintiff with all formality required by the law of the State, cannot be impeached in an action at law in a Federal court on the ground that the plaintiff was induced to accept the terms of settlement and to execute the release by false and fraudulent representations. Rev. Stat., § 914, requiring the practice in the Federal courts in actions at law to conform as nearly as may be to the State practice, does not render a State statute permitting equitable issues to be litigated in an action at law applicable to the Federal courts in that State. *Hill v. Northern Pac. Ry. Co.*, 104 F. R. 754 (Nov. 5, 1900).

Where the assent of party executing the release is given intentionally to this instrument, the inducing fraud and misrepresentations can only be proven in a suit in equity to set aside the release. *Hartshorn v. Day*, 19 How. 211 (1876); *George v. Tate*, 102 U. S. 564 (1880). But where assent of party executing is not given intentionally to the instrument because of fraud as to its nature, fraud may be proven in an action at



law, for no contract was ever created. *Railway Co. v. Harris* 158 U. S. 326 (1894). These cases seem to represent the law in the Federal courts, although the Circuit Court of Appeals, in an elaborate opinion in *Wagner v. National Life Ins. Co.*, 90 F. R. 395 (1898), allows an *unsealed* release to be impeached in an action at law. Thus the remedy in the Federal courts to impeach the release in the case at bar was, by a suit in equity, to set it aside. As equitable defenses are not allowed in actions at law in Federal courts, even under § 914, it was properly held that the release could not be impeached. *Montijo v. Owen*, 14 Blatch. 324 (S. D. N. Y. 1877); *Northern Pac. Ry. v. Paine*, 119 U. S. 561 (1887).

**INSURANCE—CONSTRUCTION OF FORFEITURE CLAUSE.**—By the terms of the policy on a church, it was forfeited if the building were unoccupied for ten days. No services were held in the building from April 1st to June 1st, when fire destroyed it. The congregation had gathered on May 16th. The sexton entered continually and cared for it. *Held*, the building was not unoccupied within the meaning of the clause. *Hampton v. Hartford Ins. Co.*, 47 At. 433 (N. J., Nov., 1900).

The Court says that "the word 'unoccupied' is . . . to be construed with reference to the nature and character of the building, the purpose for which it was designed, and the use contemplated by the parties, as expressed in the contract. Whether the building be unoccupied or no under the evidence is a question for the jury." This is in line with the decisions upon the point. *Williams v. North Ger. Ins. Co.*, 24 Fed. Rep. 625 (Iowa, 1885); *Halpin v. Phenix Ins. Co.*, 118 N. Y. 166 (1890); *Gamwell v. Merchants' Ins. Co.*, 12 Cush. 167 (Mass., 1853); *Cummins v. Agricultural Ins. Co.*, 57 N. Y., 274; *Moore v. Phenix Co.*, 14 At. 27 (N. H. 1830).

**MASTER AND SERVANT—WHEN THE RELATION EXISTS.**—Defendants let to the city for hire a steam roller, run by an engineer chosen by defendants, and paid by them, the city's agent only directing where it should be used. *Held*, defendants and not the city were liable for injuries caused by the negligence of the engineer in the management of the engine. *Stewart v. Cal. Improvement Co.*, 63 Pac. Rep. 177 (Cal., Dec., 1900).

This case represents the settled law upon this point. To constitute the relation of master and servant, there must be a right of selection and of control in the person sought to be charged, and it is not sufficient that he has the right to say what shall be done, he must be able to direct how and in what manner it shall be done. *Eaton v. The En. & N. Am. Ry. Co.*, 51 Me. 520 (1871); *Allen v. Willard*, 57 Pa. St. 374 (1868); *Seitze v. S. Paul*, 3 Minn. 297 (1859); *Cooley on Torts*, Chicago (1888), p. 532.

**MECHANICS' LIEN—INTERPRETATION OF STATUTE—EFFECT OF FORFEITURE OF CONTRACT TO SELL.**—A third party contracted for the purchase of a piece of property from the defendant. Plaintiff, before the execution of the sale, put up a building under contract with the third party, though with defendant's consent. Sale contract was avoided, and plaintiff seeks to set up a mechanic's lien against the defendant, the vendor. Lien allowed. *Beck v. Catholic University*, 67 N. Y. Sup. 305 (Oct., 1900). The building was erected with the owner's consent. He is manifestly benefited, and should be liable. This interpretation was put upon Chap. 342 of Laws of 1885 in *Schmalz v. Mead*, 125 N. Y. 188 (1891), and has been followed and recently reaffirmed under the same statute, as amended by Laws of 1895, Chap. 673. *National Wall-Paper Co. v. Sire*, 163 N. Y. 130 (May, 1900).

**NUISANCE—INJUNCTION—AUTHORITY CONFERRED BY STATUTE.**—*Held*, that a statute authorizing a railroad to build its line close to a stream gives it no power to obstruct the channel of the stream by clay slipping naturally from its embankment. *Northern Pac. Ry. Co. v. U. S.* 104 Fed. Rep. 691 (October, 1900).

In interpreting similar statutes, it has been consistently held that no authority is conferred to create such a nuisance as amounts to the taking

of property, without just compensation. *Costigan v. Ry. Co.*, 23 Atl. 810 (N. J. 1892); *Chicago & G. W. v. 1st Methodist Church*, 102 Fed. 85 (May, 1900). This class of cases is to be distinguished from those represented by *Beseman v. Ry. Co.*, 13 Atl. 164 (N. J. 1888), where the injuries were unavoidable and incidental to the operation of the railroad—smoke, noise, and the like.

**QUASI CONTRACTS.—RECOVERY OF MONEY PAID UNDER MISTAKE OF FACT.**—A was depositor in defendant bank, B in plaintiff bank. A's servant forged B's signature to check on plaintiff, drawn to "cash," and deposited same to A's account, receiving part payment in money. Plaintiff honored unindorsed check through Clearing House, its clerk, by negligence, failing to detect forgery. A has large balance to his credit with defendant. *Held*, plaintiff cannot recover. *Dedham Bank v. Everett Bank*, 59 N. E. 62 (Mass., Jan. 4, 1901).

As a general rule, money paid under mistake of fact may be recovered. *Price v. Neal*, 3 Burrows, 1354 (1762), lays down a well-recognized exception in the case of a drawee paying a forged check to a *bona fide* purchaser, on ground that drawee is bound to know the signature of his customer. *Nat. Bank v. Bangs*, 106 Mass. 441 (1871), holds the reason for *Price v. Neal* does not apply where the payment is made to payee, who may be presumed equally acquainted with signature of drawer, and impliedly to warrant genuineness of instrument. In such case drawee may recover. Substituting the name of a payee for "cash," *Nat. Bank v. Bangs* is the case at bar. But as owing to this one change plaintiff had no reason to suppose check had been in fact cashed for man who appeared to be the drawer, it seems sound to hold there was no sufficient representation by defendant to allow plaintiff to recover. cf. *Carpenter v. Nat. Bank*, 123 Mass. 66 (1877)—promissory note. For authorities, see *Keener, Quasi Contracts*, pp. 154 n—158, disapproving *Price v. Neal*; *contra*, 4 Harv. Law Rev. 297.

**REAL PROPERTY.—ESTATE BY ENTIRETY.—MORTGAGE.**—Suit is brought against a widow to foreclose a mortgage given by her during her husband's lifetime on property held by them as tenants by the entirety. By statute a married woman has power to dispose of her own property. *Held*, that the mortgage is a valid lien. *Howell v. Folsom*, 63 Pac. 116 (Ore., Dec. 1900).

It is sometimes said that when husband and wife are seized of property by the entirety neither can dispose of any part of the land without the consent of the other. A more correct statement would be: "One cannot sever the interest or make any disposition of the estate so as to affect the right of survivorship." *Enyeart v. Kepler*, 118 Ind. 34 (1888.) At common law a conveyance of the estate by the husband is valid as against him and becomes absolute if he survives his wife. The wife's inability to convey without her husband's joining in the deed being an incident, not of the estate, but of the marital relation, under modern statutes she is entitled to dispose of her interest to the same extent that her husband can alienate his. *Hiles v. Fisher*, 144 N. Y. 306 (1895).

**SURETYSHIP.—ADMINISTRATOR'S BOND.**—The surety of an administrator *held* not liable on his bond when administrator has not paid the estate a debt contracted with intestate, unless it is proved by plaintiff that administrator was able to pay the debt, or that by the exercise of due diligence he could have collected the same. *Keegan v. Smith*, 67 N. Y. Sup. 281 (Nov. 21, 1900).

A surety guarantees the obedience of the administrator to the Surrogate's decrees or orders, respecting the administration of the estate; he becomes liable for administrator's defaults. If the administrator cannot pay his debt because of continued insolvency, he has not defaulted. An adjudication by the Surrogate merely establishes that the debt is due the estate. *Baucus v. Barr*, 45 Hun 582 (1887). An administrator's sureties are liable for default in his debts to the estate on the same principle and to the same extent as for default in collecting other debts due the

estate. If administrator is insolvent, surety is not liable. *Spurlock v. Earles*, 8 Baxt. 437 (Tenn., 1874). If he is solvent and does not pay, surety is liable just as if through negligence he had lost a debt due from some other. *Lyons v. Osgood*, 58 Vt. 707 (1886). Surety is liable for such amount as might have been collected by a reasonably diligent man from administrator. *Roder v. Yeargan*, 85 Tenn. 486 (1887). The case at bar differs from *State v. Gregory*, 119 Ind. 503 (1889) in putting the burden of proving administrator's ability to pay on the plaintiff rather than making the surety prove administrator's insolvency. This is an improvement, for the plaintiff's case is not made out until he proves a default, and a default is not made out until he proves that the administrator might have paid and did not.

**TAX SALE—PURCHASE BY TENANT—EJECTMENT.**—Defendant, plaintiff's former tenant, under no obligation to pay the taxes, bought the leasehold premises at a tax sale, and set up his title adverse to that of plaintiff. Plaintiff brought ejectment, admitting that his title to the land had been by bare possession, and that he had lost this. *Held*, he could not recover. *Smith v. Newman*, 62 Pac. 1008 (Kan. Dec. 1900).

The case is sound. One who attacks a tax deed must show title to the land in himself. *Ordway v. Cowles*, 25 Pac. 862 (Kan. 1891). A tenant may not dispute his landlord's title, if it remain as it was at the beginning of his tenancy, but he may show that the title under which he entered has expired or become extinguished. *Shoup v. C. B. U. P. R. R. Co.*, 24 Kan. 547 (1880); *Simers v. Saltus*, 3 Denio. 214 (N. Y., 1846); *Elliott v. Smith*, 23 Pa. St. 131 (1854).

**TORTS—FELLOW-SERVANTS—CONTRIBUTORY NEGLIGENCE.**—A fireman on defendant's engine was killed in a collision, both engineer and train dispatcher having been negligent. *Held*, the jury might properly find that the negligence of the latter was the proximate cause, and then, since he was a vice-principal, the plaintiff was entitled to recover, though the negligence of a fellow-servant contributed to the injury. *Fellon v. Harbeson*, 104 Fed. 737 (Nov. 1900).

The train dispatcher was not a fellow-servant. *Railroad v. Stevens*, 20 Ohio 415 (1851); *Railway v. Ross*, 112 U. S. 377 (1884); *Flike v. Railroad*, 53 N. Y. 549 (1873); *Ford v. Railroad*, 110 Mass. 240 (1872); but see *Wilson v. Merry*, L. R. 1 H. L. Sc. 326 (1868), and 1 *Shearman and Redfield*, Negligence §§ 227, 230. The engineer was a fellow-servant of the fireman. *Railroad v. Baugh*, 149 U. S. 368 (1892). The question of proximate cause was properly left to the jury. *Railway v. Kellogg*, 94 U. S. 469, 474 (1876). And certainly if the negligence of the vice-principal was the proximate cause, the contributory negligence of a third party could be no defense. *Railway v. Cummings*, 106 U. S. 700 (1882); *Pollock*, Torts 392.

**TORTS—NUISANCE—LIABILITY OF OWNER OF LAND.**—Plaintiff was injured by a nuisance which was maintained by a licensee upon defendant's land with defendant's knowledge. *Held*, defendant liable, although the nuisance had been created prior to his acquisition of the land. *Inhabitants of Rockport v. Rockport Granite Co.*, 58 N. E. 1017 (Mass. Jan., 1900).

"Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequences of it. *Simmons v. Everson*, 124 N. Y. 319 (1891); *Timlin v. Standard Oil Co.*, 126 N. Y. 514 (1891). The theory is that the occupier of land is under the duty of keeping the premises in proper condition, and for his failure to act, he is liable. So if one purchases land with a nuisance upon it, he must upon notice abate it; and if he lets the land with knowledge of an existing nuisance, both he and the lessee may be liable for the continuance thereof. *Swords v. Edgar*, 59 N. Y. 28 (1874). [For an elaborate discussion of this topic see *Ahern v. Steele*, 125 N. Y. 203 (1880).] The principal case, then, may well rest on the ground of joint maintenance of a nuisance. The court, however, bases the defendant's liability on

the broad proposition. "That an owner of land is responsible for the way his land is managed by persons brought onto it by him." While there is little American authority for this principle, it has been enforced in England as to nuisances maintained by a licensee on licensor's land. *White v. Jameson*, L. R. 18 Eq. 303 (1874); *Chibnall v. Paul* (29 Wkly. Rep. 536), 3 Ex. 409 (1881).

**TORTS—OBSTRUCTION OF HIGHWAYS—NEGLIGENCE.**—Defendant left a pile of railway ties upon a part of the street which was disused and unfit for use; the ties fell upon and killed plaintiff's young son. *Held*, if plaintiff knew that children were in the habit of playing on these ties he was liable. *Kramer v. Southern Ry. Co.*, 37 S. E. 468 (N. C. Dec. 1900).

This was an indictable obstruction of the highway, though it did not actually interfere with the public right as at the time generally exercised. *Turner v. Highway Board*, 9 Eq. 418 (1870). And rights on the highway are not lost to one using it for unusual purposes. *Davies v. Mann*, 10 Mees & W. 546 (1842). It would seem that defendant was liable for the injuries resulting, whether negligence could be imputed to him, from his knowledge that children played there, or not. *Tarry v. Ashton*, 1 Q. B. D. 314 (1876). With this proof of negligence added, the defendant would have been liable though the ties were on its own property, as the dissenting judge thought the fact to be here. *Hayes v. Railroad*, 111 U. S. 228 (1884); *Railway v. McDonald*, 152 U. S. 262 (1893); and, because they were immediately adjacent to the highway, at least. *Barnes v. Ward*, 9 C. B. 392 (1850). Such holding would not, perhaps, be inconsistent with the decisions in *Daniels v. Ry.*, 154 Mass. 349 (1891) and *McAlpin v. Powell*, 70 N. Y. 126, 134 (1877), which rejected the doctrine of the turntable cases. *Railroad v. Stout*, 17 Wall. 657 (1873).

**WILLS—CONDEMNATION OF ESTATE, REVOKING DEVISE.**—Where testatrix devised specific real estate in fee, and afterwards the land was taken under eminent domain proceedings. *Held*, the devisee was not, on the death of testatrix, entitled to the moneys received by the latter as damages, since the condemnation revoked the devise. *Ametrano v. Downs*, 67 N. Y. Supp. 128 (Sup. Ct., Nov. 1900).

Where a testator sells real estate a previous devise of same is thereby revoked. *Jarman on Wills*, 6th ed., p. 129; *Burnham v. Comfort*, 108 N. Y. 535 (1888). Plaintiff contended the clause of New York Statute (Banks R. S., 9th ed., 1879, §§ 47, 48) applies only to voluntary conveyances. But *Borden v. Borden*, 2 R. I. 94 (1851), tax sale, accords with main case. Apparently there is no other American authority in point. In England the same rule of revocation has been applied in such case as in that of a voluntary sale. *Cooke v. Dealey*, 22 Beav. 196 (1855); cf. *Jarman, supra*, and cases in note. Moreover, in case at bar, testatrix's part disposal of damage moneys indicated intent to treat devise as revoked.

## BOOK REVIEWS.

A TREATISE ON THE LAW OF WILLS. By James Schouler, LL. D., Professor at Boston University Law School. Third Edition. Boston: Boston Book Company. pp. lxvi, 759.

The third edition of Professor Schouler's Treatise on Wills will be found useful chiefly for the reason that it contains references to recent English and American cases. It would be more useful if it contained more such references and fewer to text writers. The principal criticism of it is that it is frequently marred by vagueness of statement, and that often there is no successful attempt to reconcile decisions, which are discussed as conflicting, but which in the main are only apparently so because of the loose and inaccurate expressions contained in opinions. For instance, in discussing proofs of testamentary capacity (§ 172), the author states that there are two rules as to the burden of proof, the first being that the general burden of establishing capacity is upon the proponent, and the second being that there is no presumption that every adult is *compos mentis*, and that, consequently, the party who alleges insanity has the burden of establishing it. An examination of the cases will show that the conflict between these two so-called principles is more apparent than real, and that in a majority of cases that seem to conflict, the confusion comes from using the phrase "burden of proof" in two senses, one being the burden of proof on the whole case, and the other being merely the burden of going forward with the evidence. It is true that there is a presumption that an adult is normal and therefore of sound mind, so that in some jurisdictions the proponent of the will is not in the first place obliged to give evidence of capacity, but if the contestant has given such evidence of insanity that the jury cannot say that by the preponderance of evidence the testator had a sound and disposing mind and memory their verdict should be for the contestant. In this case the contestant has not proved insanity, but has merely prevented the proponent from proving capacity. The author in stating the English rule, says (§ 173) that if a party impeaches a will on account of insanity he must "establish such insanity by clear and satisfactory proof," and yet in the same section says that "still the *onus probandi* lies in every case on the party alleging a will, and he must satisfy the jury that it is the will of a capable testator." Although if one reads all that the author has to say on the subject, the true rule may be seen, yet statements like this are confusing. Another fault seems to be a failure carefully to define the meaning of "presumption" when used. There are many rules which the ecclesiastical courts laid down for their own guidance, which are mere inferences drawn from a given state of facts, they being the judges of both the law and the facts.

Such so-called presumptions are not legal rules at all, but would only be so much evidence for the jury in the particular case.

The author, in §§ 17 and 18, speaks of the "will of the state" as being sometimes in conflict with the "will of the individual," and gives several instances where they conflict, one of them being where the will is procured by fraud or undue influence, and the other where there is a revocation by change of circumstances. There is hardly a conflict here, as theoretically in the first case the paper does not represent the real "will," and in the other there is a "tacit condition" attached to the will.

That part of the work treating of the formal requisites of a will, and of revocation, alteration and republication, appear to be more satisfactory. This part would be helped by a consecutive discussion of the history of English legislation respecting wills, as our own statutes are similar to the Statute of Frauds or the present English Wills Act.

The index does not refer to "incorporation by reference," and it is not properly included under "republication," which treats of the case where a codicil revives a testamentary instrument, while papers not of a testamentary character may be incorporated in a will by proper reference.

The work, if used judiciously, will be helpful to the practicing lawyer, both for its citations and the many practical suggestions contained in it.

THE LAW OF BILLS, NOTES AND CHEQUES. By Melville M. Bigelow. Second Edition. Boston: Little, Brown & Company, 1900. pp. xxix, 349.

It would be difficult to overstate the claims of this modest-sized volume. To begin with, the author had thoroughly mastered his subject before he undertook the task of presenting it to the public in this form. Nearly thirty years ago, collaborating with Isaac F. Redfield, he published a valuable collection of leading cases on negotiable paper. Recasting the work ten years later, Mr. Bigelow followed it up with the first edition of this text in 1893, and with a new collection of cases in 1894.

In the second place, the author is not addicted either to copying or to cribbing. He thinks for himself. The conception of a subject which he presents is his own. At the same time, he does not strain after originality and he does not theorize unduly. Nor does he cite cases in support of a rule which he thinks ought to exist, simply because their outcome accords with such a rule. He knows his cases; his apprehension of the views formulated by the judges in their opinions is clear and accurate, and his statement of their reasoning as well as of their conclusions is trustworthy.

Especially well done is the opening chapter of this edition, which deals with the relation of the law prevalent to the topic of negotiable paper, and with the doctrine of consideration. Upon the latter subject, his conclusions are as follows:

"By the common law, the plaintiff in a suit on a simple contract in writing is bound to give some actual evidence of consideration; pro-

duction of the writing is not enough, unless its language itself shows what is required. By the law merchant, the plaintiff, in a suit on a negotiable instrument, makes out a *prima facie* case of consideration by producing the instrument. But as regards the very nature of consideration there is no difference between the law merchant and the common law; the common law doctrine has been fully fixed upon the law merchant in this respect."

Another valuable chapter is that on "Conflict of Laws." It is to be regretted that the substance of this chapter was not made a part of the Negotiable Instruments Law by the American sponsors for that statute.

For the English Bills of Exchange Act, reprinted in the first edition, the author has substituted in this edition the Negotiable Instruments Law of New York. Unfortunately, however, the section numbering of the statute has not been followed. As a result, the section numbers, given in the notes and in the author's copy of the statute, rarely correspond with those of the original act, and are very confusing to one who is familiar with the section numbers enacted by the Legislature. No such confusion, in fact no confusion of any kind exists in the text. The arrangement of topics is admirable; the thought is clear; the statement of doctrine is accurate; the exposition is learned.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland, D. C. L. Ninth Edition. New York: Oxford University Press. 1900. pp. xxiii, 430.

Holland's Jurisprudence has come of age, and it is too late to dispute its right to the inheritance it has won. Indeed, he would be a bold man who would to-day challenge the supremacy of this formal little treatise. When a work of so pronounced scientific a character, dealing with the most abstract conceptions of the law and making no appeal to the profession in its practical side, goes through nine editions in twenty-one years, it is evident that it satisfies the wants of its time, in philosophy and method, to a remarkable degree. Whether it satisfies with equal completeness the requirements of a great and expanding science, everywhere in touch with the practical concerns of life, whether its precise and easy classification is based on fundamental human relations or on the evanescent conditions of changing social states—these are questions which it would be impertinent to raise on the appearance of the ninth edition of this valued work. Signs are not wanting that it will be subjected to some such searching inquiry in the near future, and that, out of the historical spirit and the synthetic philosophy of our time, will come a new jurisprudence, less symmetrical and dogmatic than that which Hobbes and his followers have so long imposed upon the schools, but of broader range and deeper insight. But in this, his latest, edition, Professor Holland retains his easy mastery of the situation and challenges new admiration for the sustained firmness of his presentation and the range and freshness of his information. The latter may well be described as exhaustive. No legislation, domestic or foreign, no novel application of law, however eccentric,

no contribution to legal theory escapes his vigilant and world-wide survey of his field. He levies contribution impartially on the latest speculations of Mr. Justice Holmes, and on the newest German Civil Code. He is familiar with Professor Keener's daring application of the civil law speculation concerning "unjust enrichment." The recent abandonment in Mississippi (*Clayton v. Clark*, 74 Miss., 499, 1896), of the doctrine of *Pinnel's Case* (5 Co. Rep., 117), and the reversal by the United States Supreme Court of its position in the Income Tax cases, are equally within his ken. He has even discovered the latest and most amusing abuse of the term jurisprudence, in the existence of a chair of "Dental Jurisprudence" in the Dental School of Chicago.

Naturally, the notes have borne the brunt of amendment, but the text has been gone over with equal care and thoroughness. Perhaps the most extensive change appears in the section devoted to marital rights (pp. 164-168), which has been considerably extended and improved, and in the discussion (p. 176) of the recent far-reaching decision of the House of Lords in the case of *Allen v. Flood* ('98, A. C. 1). In the former of these, the consideration of informal marriages, illustrated by the "Scotch Marriage," based on mutual consent and established by cohabitation "with habit and repute," might well have included a reference to the so-called "Common Law Marriage," which has played such an important rôle of late in the domestic relations of our own State, and which seems now to be doomed to extinction at the hands of an unsympathetic legislature.

As may be gathered from the foregoing review, the new edition of Holland is not a new jurisprudence, but the old authoritative doctrine, newly illustrated and confirmed. It contains no new thought, but that will be matter of disappointment only to him who looks for a latter-day miracle. The old bottle is too rigid and unyielding for the wine of a new philosophy.

A TREATISE ON COVENANTS WHICH RUN WITH LAND, OTHER THAN COVENANTS FOR TITLE. By Henry Upser Sims. Chicago: Callaghan & Co. 1900. pp. xxxi, 288.

It is, as 'twere, with a defeated joy that the reader lays down this essay. So much was to be hoped from the conditions under which it was conceived! So futile and disappointing is the engendered product! It may be doubted if there is a subject in the whole range of the common law, which has been more confused by loose thinking, or one in which clearness of vision and complete freedom from prepossession are more needed to bring order out of chaos. In that twilight region, where the shifting boundaries of contract and property law meet and interlace, he who would walk safely must walk circumspectly, with open mind and abundant wisdom. The tyro may well hesitate to tread where Mr. Justice Holmes has stumbled and the great Sugden has fallen. Unhappily the little volume before us discloses neither the learning nor the disinterestedness requisite for the task essayed, and the result is confusion worse



confounded. Indeed, the book is not primarily an exposition of the law of covenants running with the land, but a serious attempt to maintain a discredited thesis, viz, that, by the common law, covenants—*i. e.*, the burden as well as the benefit—run with the land affected by them; that the modern English doctrine, denying them this effect, is an unjustifiable departure from common law principle, and that in the United States that principle has generally and properly been adopted. This is not the place for a consideration of the authorities and arguments by which these propositions are sought to be supported, but the weight of the demonstration may be judged from the fact that the first proposition rests concededly on a single case in the Year Books (Y. B., 4 Ed., III, 57, reheard in Y. B., 7 Ed., III, 65), in which a covenant not to build a mill on the covenantor's land was enforced against the latter's *heir* (not his assign), and from the further fact that the American cases cited to sustain the third proposition, with one or two doubtful exceptions, fail to do so. A favorable illustration of the author's method is afforded by his citation of the case of *Nye v. Hoyle*, decided by the Court of Appeals, Second Division, of New York, in 1890, and reported 120 N. Y., 195, as decisive of the general proposition that burdens, active as well as passive, may be annexed to land by covenant. It is, perhaps, an immaterial circumstance that it was not the plaintiff (as reported by our author, p. 152), but the defendant, who succeeded in the action; but the fact that the covenant of plaintiffs' grantor was in support of a water privilege created at the same time, by the same instrument, is certainly material to the question whether it comes under the general rule, or under the familiar exception in favor of covenants in support of easements.

The foregoing comments on Mr. Sims' essay indicate sufficiently, perhaps, the criticism which it invites. Not that it fails to sustain its singular thesis—it has the best of legal company in that limbo of failures—but that its reading of the authorities is inaccurate and ill-digested, its reasoning narrow and technical, and its conclusions forced to fit a preconceived theory. To this should be added that, along with a considerable power of vigorous and graphic expression, the book betrays a singular infelicity of phrase. Such combinations as these—"and to greater complicate matters," "equally as apparent," "land hitherto to be acquired," "some principle which could be an origin of covenants"—are of too frequent occurrence to be referred to haste in composition or to carelessness in proofreading.

It is no pleasant task to dwell on the faults of a work so well conceived, so serious in its aim, so faithfully executed. For, with all its imperfections, the book is one to be cordially welcomed; not, indeed, for what it has achieved, but for what it has attempted and for the promise which it brings. It is high time for the scientific spirit and method which are transforming our law schools to bring forth fruit, and such books as this should come, in increasing number, from every law press in the land. Many of them will be crude, as this is, and many will have less saving grace than this has, but at

their worst they will do more for American law and the American bar than most of the approved "treatises" that cumber our shelves with those sweepings of law offices, with which a grateful bar pays its debt to a long-suffering profession.

Reviews to follow:

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## THE EFFECT OF WAR ON PUBLIC DEBTS AND ON TREATIES—THE CASE OF THE SPANISH INDEMNITY.

ON April 30, 1898, the Spanish Government issued a decree by which it was, among other things, declared:

“The war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795; the protocol of the 12th January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries.”

When, several weeks after its issuance, a copy of this decree, as published in the *London Gazette*, was received by the Department of State, it seems to have been assumed that the clause above quoted was to be understood in a very general sense, and was not intended to be taken literally, since there existed in the treaties between the two countries, not only stipulations which were permanent in their nature, but also stipulations which expressly referred to a state of war and could become operative only upon the happening of that event.

Not long afterwards, however, a rumor got abroad to the effect that the Spanish Government was contemplating the issuance of a decree of expulsion against citizens of the United States who might be within the Spanish dominions.

By Article XIII of the treaty of October 27, 1795, it was agreed that, if a war should break out between the two nations, one year after the declaration of war should be allowed to the merchants in the cities and towns where they should live for collecting and transporting their goods and merchandise. In view of the rumor referred to, the Department of State caused the attention of the Spanish Government to be drawn to this stipulation through the British Ambassador at Madrid. The Spanish Government replied that it considered all treaties between the two countries to be at an end, but offered to enter into a special convention for the provisional application during the war of the stipulation in question. The United States declined to accept this proposal on the ground that the stipulation, instead of being abrogated by the state of war, must be considered as finding therein its full force and effect. Here the correspondence closed. No decree of expulsion was issued; and, the claim of the Spanish Government to treat all stipulations between the two countries as at an end having been expressly avowed, it seems to have been thought useless to engage in further correspondence upon the subject at that time.

In the treaty of peace between the United States and Spain, signed at Paris December 10, 1898, there is no stipulation on the subject now under consideration. By Article VII the contracting parties "mutually relinquish all claims for indemnity," but this relinquishment is expressly restricted to claims "that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications." During the negotiation of the treaty, however, the American commissioners proposed an article by which all the treaties in existence between the two countries at the outbreak of the war were enumerated and declared to continue in force. This article was taken up for consideration at the conference held on the 8th of December. The President of the Spanish commission stated that the Spanish commissioners were unable to accept the article, but added: "Some of the treaties to which it referred were obsolete or related to conditions which no longer existed, and it would involve a more extended examination than the Joint Commission was in a position to give.



But this did not imply that the two governments might not take up the subject themselves.”<sup>1</sup>

Among the treaties in force between the United States and Spain at the outbreak of the war, there was a convention signed at Madrid, February 17, 1834, under which an indemnity was provided for certain claims of citizens of the United States against the Spanish Government. The claims in question grew chiefly out of the seizure and confiscation of American vessels and cargoes for alleged violations of decrees issued by Spanish commanders during the war between Spain and her American colonies. British subjects had similar claims, for the enforcement of which their Government resorted to reprisals; and satisfaction was made by Spain in 1828, by the payment of 600,000 pounds sterling, in inscriptions redeemable within a fixed time. The United States forbore to press the claims of its citizens, except by negotiation, and they were not adjusted till February 17, 1834. By Article I of the convention signed at Madrid on that day, Spain agreed to pay the United States, in settlement of the claims, “the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the Government of the United States, of perpetual rents, on the Great Book of the Consolidated Debt of Spain, bearing an interest of five per cent. per annum.” The inscriptions were to be issued in conformity with a model annexed to the convention, and they, or the proceeds thereof, were to be distributed by the Government of the United States among the claimants entitled thereto, in such manner as it might deem just and equitable. The interest on the inscriptions was to be paid in Paris every six months.

The form of the inscription, as annexed to the treaty, is as follows :

|                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                         |
|-------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.<br>Cupon de<br>pesos fuertes en<br>renta pagadero en<br>de 183<br>Cupon No. 10. | Renta perpetua de España,<br>pagadera en Paris<br>á razon de 5 p. 0-0 al año,<br>inscrita en el gran libro de la Deuda consolidada.<br><br>Esta Inscripcion se expide á consecuencia de un con-<br>venio celebrado en Madrid en _____ de _____<br>entre S. M. Catolica la Reyna de España y los Estados<br>Unidos de America, para el pago de las reclamaciones de<br>los ciudadanos de dichos Estados. |
|-------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

<sup>1</sup> Ex. Doc. B, 55 Cong., 2 Sess., Part 2, p. 254.

## INSCRIPCION NO.

| <i>Capital.</i> |   | <i>Renta.</i>   |
|-----------------|---|-----------------|
| Pesos fuertes   | : | Pesos fuertes   |
| ó sean francos. | : | ó sean francos. |

El portador de la presente tiene derecho á una renta anual de pesos fuertes, ó sea de francos, pagaderos en Paris por semestres, en los dias de y de por los banqueros de España en aquella capital, á razon de 5 francos y 40 centimos por peso fuerte, con arreglo al Rl. decreto de 15 de Diciembre de 1825.

Consiguiente al mismo real decreto se destina cada año á la amortizacion de esta renta uno por ciento de su valor nominal, á interes compuesto, cuyo importe sera empleado en su amortizacion periodica al curso corriente por dichos banqueros.—*Madrid,* de de *El Secretario de Estado y del Despacho de Hacienda.*

*El Director de la Rl. Caja de Amortizacion.*

This inscription, using for the purpose the English text of the treaty wherever applicable, may be translated as follows :

No.  
Coupon of -  
hard pesos of  
interest payable on  
the - the -  
183 -  
Coupon No. 1.

## Perpetual Rent of Spain

payable in Paris

at the rate of 5 per cent. per annum, inscribed in the great book of the consolidated Debt.

This inscription is issued in pursuance of a convention concluded at Madrid on the of , between Her Catholic Majesty, the Queen of Spain, and the United States of America, for the payment of the claims of the citizens of said States.

## INSCRIPTION NO.

Principal.

Interest.

Hard pesos or francs.

Hard pesos or francs.

The bearer of this is entitled to an annual interest of hard pesos, or francs, payable in Paris semi-annually, on the day of and of , by the bankers of Spain in that capital, at the rate of 5 francs and 40 centimes for the hard peso, in accordance with the Royal decree of December 15, 1825.

Pursuant to the same royal decree there is set aside each year for the amortization of this rent one per cent. of its nominal value, at compound interest, which amount shall be employed in such periodical amortization at the current rate by said bankers.—*Madrid,* of of

*The Secretary of State for the Treasury.*

*The Director of the Royal Bureau of Amortization.*

The inscriptions, in proper form, with the coupons annexed, were delivered to the United States and deposited in Paris. On June 7, 1836, an act of Congress was approved, under which a commissioner was appointed for the purpose of deciding upon the merits of the various claims to an interest in the inscriptions. By the same act the Secretary of the Treasury was authorized to distribute in ratable proportions among persons in whose favor awards were to be made any money received into the Treasury under the international settlement, and to cause certificates to be made to awardees showing the proportions to which they were entitled. The act was duly carried into effect; and certificates were issued on which the interest on the "perpetual rents," as it was from time to time received, was distributed. The first four semi-annual installments of interest were duly paid; but, owing to lack of funds, payments were then suspended until 1841, when they were resumed at the rate of \$60,000 a year till the arrears were discharged. Subsequently an arrangement was made, under which the sum of \$28,500 was paid each year to the Department of State in full discharge of the annual interest. During the late war this payment was not made. The operation of the convention of 1834 was thus, in fact, suspended.

As the treaty of peace contained no stipulation on the subject, the question as to the continuing obligation of the debt, and of the convention by which it was guaranteed, remained to be determined by the two governments on the general principles of international law. We may therefore consider, with reference to those principles, the question of the effect of war, first, on public debts, and second on treaties.

By the testimony of publicists and the practice of nations, the principle is established that the obligation of a state for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. It is true that in certain early writers, who reiterate the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies,

and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed.

With the law of the present day as to private debts, we are not now concerned; but, as to the law touching public debts, the current of opinion is unvarying. Vattel, writing in the last century declared: "The state does not so much as touch *the sums which it owes to the enemy*; money lent to the public is everywhere exempt from confiscation and seizure.<sup>1</sup>"

This principle, says Phillimore, "is one which now may happily be said to have no gainsayers."<sup>2</sup>

The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it. The payment of the interest was in fact resumed, but, while the question was still pending, the King of Prussia presented in justification of his course a Memorial. To this Memorial a famous Answer was prepared for the British Government by Sir George Lee, Judge of the Prerogative Court; Dr. Paul, the Advocate General; Sir Dudley Ryder, and Mr. Murray, afterward Lord Mansfield. In this Answer there is the following passage:

"It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to a private man. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England, France and Spain adhere to this public faith, that even during the war they

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<sup>1</sup> Laws of Nations, Book III, Ch. V., Sec. 78, Phila. Ed., 1858, p. 323.

<sup>2</sup> Int. Law, 2d ed., II, 148.

suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours." <sup>1</sup>

It will be observed that Spain is here referred to as one of the powers by whose conduct the inviolability of the public faith in respect of debts was, more than a century and a half ago, established.

Vattel described the British Answer as "an excellent bit of the law of nations" (*un excellent morceau de droit des gens*), while Montesquieu pronounced it "an answer without a rejoinder" (*une réponse sans réplique*).<sup>2</sup> It is commended by Twiss,<sup>3</sup> by Calvo,<sup>4</sup> and generally by other publicists.

Says Pradier-Fodéré: "States cannot confiscate to their profit that which they ought themselves to pay to subjects of the enemy, as by seizing the rents of the public debt. How, indeed, can it be admitted that a state may deprive of their due individuals who, under the guarantee of the law and the public faith, have confided to it their capital." <sup>5</sup>

Fiore asserts the same principle in almost the same words, and adds: "All that we could excuse in case of extreme necessity would be the suspension of payments during the war when the want of money rendered that measure indispensable and when the state would have no other means less ruinous of providing for the urgent necessity of the war. But even that expedient, which may be excusable if the Government afterwards makes the payments which were postponed at the conclusion of peace, would always be disastrous, because it would undermine the base of the economic life of the state—the public credit." <sup>6</sup>

Finally, without unnecessarily multiplying authorities on

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<sup>1</sup> *Collectanea Juridica*, I, 154.

<sup>2</sup> Vattel, Book II, Ch. vii, sec. 84, n; Phillimore, 2nd ed., III, 34.

<sup>3</sup> *Law of Nations, Rights and Duties in Time of War*, London, 1863, pp. 110–114).

<sup>4</sup> *Droit Int.*, 4th ed., iv, 55, sec. 1917.

<sup>5</sup> *Traité de Droit International Public*, Paris, 1894, vi, 740.

<sup>6</sup> *Nouve au Droit International Public*, Paris, 1886, III, 226, sec. 1392.

a point which is undisputed, we may quote from Hall, in view of his eminence among modern publicists, the following passage:

"Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always be looked upon with extreme disfavor, it would be unsafe to declare that it is not generally within the bare rights of war.

"In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated, and the interest payable upon it is not sequestered. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honor, because a prince cannot be compelled like other men in an adverse way by a Court of Justice,' it is now so confirmed that in the absence of an expressed reservation of the right to sequester the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances."<sup>1</sup>

As to the effect of war upon treaties, we find in the publicists much contrariety of views; but it may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present day. The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word treaties has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes—*pacta transitoria*, or "transitory conventions," as the words have been unfortunately translated, and "treaties, properly so-called." In the former class were included international compacts by which a

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<sup>1</sup>International Law, 4th ed., 1895, p. 453.

status was permanently established, or a right permanently vested ; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn, it was said that "treaties" were terminated by war, the word treaties being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side and denied on the other, when in reality the word was used by the parties in different senses—by the one in its general and usual sense, and by the other in its special and restricted sense. For example, in the correspondence between John Quincy Adams and Lord Bathurst as to the question whether the "liberties" of American fishermen under the treaty of peace of 1783 were terminated by the war of 1812, Mr. Adams maintained that the "treaty of peace" "was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties."<sup>1</sup> Lord Bathurst replied: "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties."<sup>2</sup> Nevertheless, his lordship in the same note declared: "The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary character." And it may be assumed that if the treaty had been composed wholly of provisions deemed by his lordship to be of the former character, there would have been no controversy between him and Mr. Adams.

It is evident that in the arguments of these statesmen, as well as in the classification of treaties above referred to, there was a recognition of the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon

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<sup>1</sup> Am. State Papers, For. Rel., IV., 352.

<sup>2</sup> *Id.*, 355.

their intrinsic character. If they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled.

Says Vattel: "The conventions, the treaties made with a nation, are broken or annulled by a war arising between the contracting parties, either because these compacts are grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty. Yet here we must except those treaties by which certain things are stipulated in case of a rupture—as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country—the neutrality of a town or province, insured by mutual consent, etc. Since, by treaties of this nature, we mean to provide for what shall be observed in case of a rupture, we renounce the right of cancelling them by a declaration of war."<sup>1</sup>

The renowned Swiss publicist thus not only denies that all treaties are broken or annulled by war, but he also declares that, where they are so affected, it is either because they are "grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty." It therefore cannot be doubted that, if the question as to a treaty by which a public debt is guaranteed had been specifically brought to his attention, he would have answered that such a treaty could not be considered as broken or annulled, since, by his own statement, as heretofore quoted, it appears that debts which the state owes to the enemy are "everywhere exempt from confiscation and seizure in case of war." And if, as in the present instance, the treaty had employed terms of perpetuity, he doubtless would have answered further that the contracting parties must be considered to have renounced their right to cancel it by a declaration of war.

The reasoning of Vattel has been repeated by many

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<sup>1</sup> Vattel, *Int. Law*, Book III, Chap. X, sec. 175, Phila. ed., 1858, p. 371.



writers, and among others by Riquelme, who observes that war annuls "all the treaties which form the international legislation between the belligerent States," and that "the reason why these treaties perish by war, is because they are made with reference to peace, and, since it is lawful to take possession of whatever belongs to the enemy government, with greater reason it is proper to deprive it of the rights which grow out of the treaties."<sup>1</sup> The limitation by Riquelme in this passage of the general right of seizure to things belonging "to the enemy government" (*cuanto pertenece al gobierno enemigo*), will be noted.

Says Kent: "Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war."<sup>2</sup> Wheaton expresses himself to the same effect.<sup>3</sup> Phillimore ascribes the errors of some writers in discussing the effect of war on treaties to their failure to distinguish between treaties temporary in their nature and treaties which contain "a final adjustment of a particular question, such as the fixing of a disputed boundary or ascertaining any contested right or property."<sup>4</sup> To questions of *private property*, he declares that the doctrine of the abrogation of treaties by war is "certainly not applicable." Rivier expresses the same opinion.<sup>5</sup> Hall, referring to the effect of war on "treaties with political objects, intended to set up a permanent state of things by an act done once for all," declares that compacts of this kind "must in all cases be regarded as continuing to impose obligations until they are either suspended by a fresh agreement or are invalidated by a sufficiently long adverse prescription;" and he further declares that where treaties, such as conventions to abolish the *droit d'aubaine* or regulate the acquisition and loss of nationality, may be considered as suspended during war, "the effects

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<sup>1</sup> *Elementos de Derecho Público Internacional*, Madrid, 1849, I, 171.

<sup>2</sup> *Comm.*, I, 177.

<sup>3</sup> *Int. Law*, Lawrence's ed., 1863, p. 460.

<sup>4</sup> *Int. Law*, 2d ed., III, 796.

<sup>5</sup> *Principes du Droit des Gens*, Paris, 1896, II, 137.

of acts previously done under their sanction must remain unaltered."<sup>1</sup>

Says Fiore: "As to treaties between belligerents, it cannot be admitted that the state of war extinguishes them all, but only such as are incompatible with that state."<sup>2</sup> Pillet truly declares that the view that the declaration of war annuls all treaties between the belligerents, "is no longer held by any one."<sup>3</sup>

While forbearing to cite the many other authorities to the same effect, we may quote from the great work of Calvo the following statement:

"What effect does the declaration of war produce on treaties which bind the contracting parties at the moment of the rupture of their pacific relations? Are these international acts all and wholly annulled in strict law, or yet do some of them fall, while others remain in force? The solution of these questions depends naturally upon the particular character of the engagements contracted. Thus all are agreed in admitting the rupture of conventional ties concluded expressly with a view to a state of peace, of those whose special object is to promote relations of harmony between nation and nation, such as treaties of amity, of alliance, and other acts of the same nature having a political character. As to customs and postal arrangements, conventions of navigation and commerce, and agreements relative to private interests, they are generally considered as suspended till the cessation of hostilities. By necessary consequence, it is a principle that every stipulation written with reference to war, as well as all clauses described as perpetual (*qualifiées de perpétuelles*), preserve in spite of the outbreak of hostilities their obligatory force so long as the belligerents have not, by common accord, annulled them or replaced them with others."<sup>4</sup>

It is not strange that principles thus universally accepted have been affirmed in the decisions of judicial courts. By Article VI of the Treaty of Peace between the United States and Great Britain of September 3, 1783, it

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<sup>1</sup> Int. Law, 4th ed., p. 404.

<sup>2</sup> Nouveau Droit International Public, Paris, 1886, III, 83.

<sup>3</sup> Les Lois actuelles de la Guerre, Paris, 1898, p. 77, Sec. 43.

<sup>4</sup> Droit Int., 4th ed., IV, 65, Sec. 1931.

was declared that there should be "no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of, the part he or they may have taken in the present war," and that no person should, "on that account, suffer any future loss or damage, either in his person, liberty or property." By Article IX of the treaty between the same powers of November 19, 1794, it was agreed "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." By Article XXVIII, the first ten articles of the treaty were declared to be "permanent," while the subsequent articles, with one exception, were "limited in their duration to twelve years."

The question whether the stipulations of Article X were affected by the war of 1812 came before the Supreme Court of the United States in the case of the *Society for the Propagation of the Gospel*, a British association, against the *Town of New Haven*; and a decision was rendered to the effect that the stipulations remained in full force. The court, in the course of its opinion, said: "We think that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new or repugnant stipulations are made, they revive in their operations at the return of peace."<sup>1</sup>

Seven years later, in 1830, the same question was decided by the Court of Chancery in England, in the case of *Sutton v. Sutton*, in which a citizen of the United States claimed the right, under Article IX of the treaty of 1794, to hold and convey, in spite of his alienage, certain real estate in

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<sup>1</sup>8 Wheaton, 464, 494, A. D. 1823.

London. It appeared that in 1797 an act of Parliament (37 Geo. III, c. 97) was passed to carry the treaty into effect. Of this act, Sections 24 and 25 related to Article 1X, and the last section, which was the 27th, declared: "This act shall continue in force so long as the said treaty between His Majesty and the United States of America shall continue in force and no longer." It was argued, both upon the strength of this section, and upon general principles, that, as the result of the war of 1812, the treaty of 1794 had ceased to be in force; that "it was impossible to suggest that the treaty was continuing in force in 1813," that is to say, during the existence of the war; that it "necessarily ceased with the commencement of the war;" that "the 37 G. 3, c. 97, could not continue in operation a moment longer without violating the plainest words of the act;" and that the word "permanent" was used, "not as synonymous with 'perpetual or everlasting,' but in opposition to a period expressly limited."

It is to be observed that counsel impliedly conceded that if the word "perpetual" had been employed in the article, there would have been no doubt as to its survival.

Sir John Leach, Master of the Rolls, decided that the article continued in full force at all times, saying:

"The relations which have subsisted between Great Britain and America, while they formed one empire, led to the introduction of the ninth article of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

"The Act of the 37 G. 3 gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and

when a subsequent section provides that the act is to continue in force, so long as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but it is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace."<sup>1</sup>

A decision was therefore rendered in favor of the right claimed by the American citizen.

Upon full consideration of the matter, it would be reasonable to conclude, were it not for the incident in regard to the question of expulsion, that the assertion in the Spanish decree, that the war terminated all treaties and conventions previously existing between the two countries, was inadvertent. But, however this may be, Spain did not in the end maintain that position. Frankly recognizing, to the fullest extent, her obligations under the convention of 1834, she paid in December, 1899, not only the interest for that year, but also the interest for 1898, and, in so doing, said: "In thus paying the two annuities, which on account of the late war had been suspended, the punctiliousness with which the Government of His Catholic Majesty attends to its international obligations will be clearly shown." By this act, and the explanation with which it was accompanied, both the debt and the convention were acknowledged to continue in full force, and an important precedent was established.

J. B. MOORE.

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<sup>1</sup> 1 Russell & Mylne, 663.

## THE NEW YORK REVISED STATUTES AND THE RULE AGAINST PERPETUITIES.

THE Revised Statutes of 1830 are an impressive illustration of the futility of trying to make the law definite and certain by codification. It is not probable that any men better fitted for the task could be secured than the able and distinguished lawyers who were the authors of this revision, or that codification could ever be accomplished in this country under more favorable conditions. The aim of the revisers, so far as the law of real property is concerned, as stated in their report to the Legislature, was "to render the system simple, uniform and intelligible, which in its present state is various, complicated and abstruse," and they set before themselves as their ideal the French law of real estate, which, they claimed, might be "sufficiently understood by a *few days* of diligent study." What an extraordinary delusion it was to suppose that this ideal was attainable! What an extraordinary faith in the power of words! What an extraordinary misconception of the fundamental difficulties of the problem with which they had to deal! And what has been the result? The same which has always followed codification with its attendant inevitable struggle between the written word and the spirit of justice—that spirit which like the spirit of mercy is mighty, which is enthroned in the hearts of the judges and will always struggle to assert her benignant sway in spite of all the letters upon the statute book.

The revisers undertook to abolish the old law of uses and trusts of real property and to establish a bran-new system, simple and intelligible after a few days' study. But no sooner was the revision adopted than fierce and costly litigation arose with respect to all the provisions which were intended to effect fundamental modifications in the existing law. Instead of a few days it took nearly twenty years to determine whether or not "a trust to pay over rents," the old familiar form of trust, was authorized under 1 R. S., 728, section 55, subdivision 3, and the Court finally decided that it was—a conclusion not justified by the

words of the statute and clearly opposed to the intention of the revisers.<sup>1</sup> After more than sixty years of conflicting opinions the Court of Appeals declared that it was still unsettled whether a trust to pay annuities came within the terms of subdivision 3 or subdivision 2 of section 55, and, in opposition to the letter of the statute, the Court decided that it came within subdivision 3.<sup>2</sup> After nearly seventy years it was discovered and decided that, while the interest of a *cestui que trust* in a trust for the payment of rents is inalienable and therefore beyond the reach of creditors, except as to the surplus over and above what is required for his support, the interest of a *cestui que trust* in a trust of which he is himself the creator, can be reached by his creditors.<sup>3</sup> This decision involved, as it was pointed out in the dissenting opinion, an absolute disregard of the statute,<sup>4</sup> but it was adopted because any other proposition "would seem to shock our sense of justice." For more than forty years a desperate struggle was maintained over the question whether or not charitable trusts were valid in this State,<sup>5</sup> and although it is stated that the controversy was closed in 1873, a sort of desultory skirmishing continued for twenty years longer. But no sooner had the law, as it was reasonable to hope, been finally settled than the Legislature passed an act (Laws of 1893, Chap. 701), which, it has been held, has destroyed the work of these sixty years and has restored the English system of charitable uses.<sup>6</sup>

The Rule against Perpetuities is another illustration showing that codification does not simplify, but complicates, and does not prevent, but promotes, litigation. It might have been supposed indeed that this rule could have been defined clearly and definitely, so as to avoid the questions which have troubled the English courts under their system of unwritten law, but the fact is that the pro-

<sup>1</sup> *Leggett v. Perkins*, 2 N. Y., 297, 3 Revised Statutes, 2d Ed. Revisers' Notes, p. 585.

<sup>2</sup> *Cochrane v. Schell*, 140 N. Y. pp. 528-535.

<sup>3</sup> *Schenck v. Barnes*, 156 N. Y. 316.

<sup>4</sup> *Id.*, pp. 325-327.

<sup>5</sup> *Holmes v. Meade*, 52 N. Y. 332; *Holland v. Alcock*, 108 N. Y. at p. 336.

<sup>6</sup> *Allen v. Stevens*, 161 N. Y. 122.

visions of the Revised Statutes relating to this rule have been a most fruitful source of litigation, and they are still involved in so much doubt as to embarrass the courts.

The provisions in question are found in Part II, Chapter I, Title II, Article I<sup>1</sup> and are as follows:

"Section 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed."

"Section 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of more than two lives in being at the creation of the estate, except in the single case mentioned in the next section."

"Section 16. A contingent remainder in fee may be created on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."

"Section 20. A contingent remainder shall not be created on a term of years unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder or upon the termination thereof."

"Section 23. All the provisions contained in this Article relative to future estates shall be construed to apply to limitations of chattels real as well as freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee."

"Section 24. Subject to the rules prescribed in the preceding sections of this Article, a freehold estate as well as a chattel real, may be created to commence at a future day; \* \* \* and a fee may be limited upon a fee upon

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<sup>1</sup> 1 R. S. 723-725.



a contingency, which, if it should occur, must happen within the period prescribed within this Article."

"Section 25. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession."<sup>1</sup>

If there were no other provisions than those contained in sections 14 and 15, it would be as plain as language could make it that the New York Rule against Perpetuities was aimed solely at preventing the suspension of the power of alienation, and that the rule is never violated when there is no suspension of such power, whatever may be the limitations of contingent future interests. Whether the converse of this is true—and it was the intention of the revisers that the rule should be deemed violated whenever there is a suspension of the power of alienation—is not so clear. Section 14 clearly provides that only future estates shall be void in case of the suspension of the power of alienation beyond the statutory period, and section 15 defines what the statutory period is, viz., two lives, except in the single case mentioned in section 16, and the case mentioned in section 16 is that of a contingent remainder. Reading these sections together it would seem that they were intended to declare simply that *future* estates shall be void which suspend the power of alienation for more than two lives, or, in the excepted case, more than two lives and a minority of a third life, and that the revisers did not have in mind the possible suspension of the power of alienation which may be occasioned by the creation of present trust estates under subdivision 3 of section 55. Indeed, the revisers, in their report to the Legislature, expressly stated that they had in mind only contingent future interests.<sup>2</sup>

<sup>1</sup> There are other provisions (secs. 17, 18, 19 and 21), restricting the power of limiting life estates and remainders after them, but these do not properly belong under the Rule against Perpetuities, as they relate to vested interests which do not restrain alienation.

<sup>2</sup> "To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add that an estate is never inalienable unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested, as where the lands are given to A for life, remainder to B (a person then in being), there is no suspension of the power of alienation, for the remainderman and the owner of the prior estate by uniting may always convey the whole estate. *This is the meaning of the rule of law prohibiting perpetuities and is the effect of the definition in Section 14.* 3 R. S., 2d Ed., Revisers' Notes, p. 573.

It was, however, settled at a comparatively early day that trusts, as well as future estates, which occasion a suspension of the power of alienation, are violations of the rule.<sup>1</sup> These decisions are justified, because the interest of a *cestui que trust* in a trust created under subdivision 3 of section 55 being inalienable, such a trust involves a suspension of the power of alienation. By the terms of subdivision 3 such a trust is made "subject to the rules prescribed in the First Article," and among these rules are those contained in section 14 and section 15. Hence, a trust which suspends the power of alienation is void in like manner as a future estate.

We may say, therefore, that the Rule against Perpetuities, stated in section 14 and section 15, as interpreted by the courts in connection with subdivision 3 of section 55, was aimed simply at restraints upon alienation. The rule is violated whenever there is a suspension of the power of alienation, no matter whether this is occasioned by future contingent interests or present trust estates, and the rule is not violated whenever there is no suspension of the power of alienation, no matter what may be the limitations of contingent future interests or when these contingent interests may vest.<sup>2</sup>

There are, however, as we have shown, other provisions than those contained in section 14 and section 15 (sections 16, 20, 23, 24), and these have raised the question whether there are or not two distinct rules, the one aimed at restraints on alienation and the other aimed at remote vesting.<sup>3</sup> We submit, however, that none of the provisions above cited contain any other rule than that stated in section 14 and section 15.

Section 16 provides that a contingent remainder in fee may be created on a prior remainder in fee, if limited to take effect as prescribed in that section, and it may be

<sup>1</sup> "Coster v. Lorillard, 14 Wend., 265; Hawley v. James, 16 Wend., 61.

<sup>2</sup> The Real Property Law, curiously enough, combines sections 14, 15 and 16, so that, according to the letter of the law as now written, only future estates are void, but the courts will, doubtless, interpret this new section as embodying the terms of the old law,

<sup>3</sup> See especially Chaplin on Suspension of the Power of Alienation, pp. 1, 2, 184 ff.

argued that a contingent remainder not so limited would be void, whether it involved a suspension of the power of alienation or not. But read in connection with section 15, as it must be, such an inference in regard to the meaning of section 16 is not justified. Section 15 says that the power of alienation shall not be suspended by any limitation or condition for a longer period than two lives except in the single case in the next section. The next section is section 16 and the single case is that of the contingent remainder therein mentioned. The section must therefore be interpreted as if it read: "A contingent remainder in fee, *which involves the suspension of the power of alienation* may be created," etc. Therefore a contingent remainder in fee which does not involve such a suspension could, so far as section 16 is concerned, be limited so as to take effect after any number of lives. As, according to section 25, contingent interests are alienable, if there is any person in existence to alienate them, the only contingent interests which can occasion a suspension of the power of alienation are those limited in favor of persons or corporations not in existence, and it is therefore only such interests that violate the rule.

Section 23 provides that limitations of chattels real are subject to the same rules as the limitations of real estate, *so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.* This, so far from supporting any different rule, emphasizes the fact that what the revisers had in mind was simply to prevent restraints upon alienation, and that the only limitations of future interests which are objectionable are those which restrain alienation.

Section 24 provides that "a fee may be limited upon a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this Article." This, it must be conceded, is ambiguous, and it may be claimed that it means that a fee may be limited upon a fee, provided that it must vest within the statutory period; but the word "vest" is not used; the section is, in fact, a repetition of the provisions of section 16, and should be construed in conformity with them, and in connection with section 23, which

immediately precedes it, it would seem that it must be interpreted as if it read, "a fee may be limited upon a fee, provided that it does not occasion a suspension of the power of alienation beyond the period prescribed in this Article."

Section 20, however, does in terms provide that a contingent remainder limited on a term of years is void unless it must *vest in interest* during the continuance, or at the termination of two lives; but there is no sufficient reason for supposing that the revisers intended in this section to state a separate and exclusive rule in regard to contingent remainders limited after terms of years. Read in connection with the other sections and with due regard to the avowed purposes of the revisers, as stated in their notes<sup>1</sup> the words "vest in interest," in this section must be understood as having a different meaning than the common law meaning. They must be understood as meaning "vest in some person having the power of alienation." That they are often understood in this sense is clear from many cases<sup>2</sup>.

The foregoing views are supported by the great weight of authority.<sup>3</sup>

It must be conceded, however, that there are decisions and statements in the text-books and cases which cannot be reconciled with them.

*Hannan v. Osborn*, 4 Paige, 336. Here was a devise to testator's sister, Mary, for life, remainder to her children, "but in case my said sister shall die, and all her children shall die, leaving no children," then to his brother John and sisters Juliana and Amelia. *Held*, that this limitation over was void, because it was not to take effect until after the possible termination of many lives. But, although it was not to take effect, John, Juliana and Amelia could alienate their contingent interests, and so the existence of these contingent interests did not restrain alienation. "The

<sup>1</sup> See especially 3 R. S., 2d Ed., p. 573 *supra*, p. 227, note 2),

<sup>2</sup> *Leonard v. Burr*, 18 N. Y., at p. 107; *Mott v. Ackermann*, 92 N. Y., at 550; *Henderson v. Henderson*, 113 N. Y., at p. 15 and cases *infra*, 2, note 3).

<sup>3</sup> *Robert v. Corning*, 89 N. Y. 225; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Nellis v. Nellis*, 99 N. Y. 505, *Murphy v. Whitney*, 140 N. Y. 541; *Sawyer v. Cubby*, 146 N. Y. 192; *Williams v. Montgomery*, 148 N. Y. 519; *Mills v. Mills*, 50 App. Div. 221.

mistake of the decision," to quote the language of the Court in *Sawyer v. Cubby*, 146 N. Y., at page 199, "is in construing a contingency dependent upon a future event which may or may not occur as necessarily making the legacy inalienable. It does not do so. The contingency which works that result is one relating to the persons who shall take, and who either may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it happens that there is no one who can alienate."

*McSorley v. Wilson*, 4 Sandf. Ch., 515. This was a devise in trust for A for life, for B for life, then for C for life, but the trustees had an uncontrollable discretion at any time to sell the land, and in case of sale C had the right to demand and receive the proceeds as his absolute property, and thereupon the trust was to cease. *Held*, that this was void because the trust might continue through three lives. It is true that the trust might continue, but there is no provision in the statute declaring that trusts shall not continue for any number of lives, but only a provision declaring that trusts cannot be constituted which will involve a suspension of the power of alienation for more than two lives. In this case the power of alienation was not suspended for a single day, because the trustee and *cestui que trust* by uniting at any time could convey an absolute title. The reasoning upon this point of the majority of the Court in *Mills v. Mills*, 50 App. Div., 221, is unanswerable. And since the legislation of 1893 providing for the termination of trusts it would seem that now no trust, however long it may endure, can violate the rule, if it is followed by a vested remainder. For the only reason why a trust did violate the rule before 1893 was because it involved a restraint upon alienation. But now that trusts followed by vested remainders are terminable (Laws of 1893, Chap. 452; Laws of 1896, Chap. 547, and Laws of 1897, Chap. 417), the power of alienation is not suspended, and hence there is no violation of the rule. In constituting, however, a trust such as was considered in *Mills v. Mills* (*supra*), care must be taken not to violate other provisions of law. An estate vested in trustees to hold during the lives of three other persons would be an estate *pour autre vie* under the English law. It is doubtful how such an estate is to be regarded under

the Revised Statutes.<sup>1</sup> If it is an estate *pour autre vie*, then sections 18 and 19<sup>2</sup> apply. According to section 18, no remainder can be created after an estate *pour autre vie*, unless such remainder be in fee, and according to section 19, a remainder limited after an estate *pour autre vie*, where more than two persons are named during whose lives the estate is to continue, takes effect upon the death of the two persons first named in the same manner as if no other lives had been introduced. These difficulties may be avoided by expressly giving the trustee a fee, with power of sale, or an estate for a long number of years, and providing for a vested remainder after that. According to the very extraordinary provisions of section 17<sup>3</sup>, only two successive life estates can be created under our law, and a vested remainder after more than two successive life estates takes effect after the termination of the first two life estates, and all the other life estates are void. This curious bit of legislation, however, is held to apply only to legal estates,<sup>4</sup> and therefore, does not stand in the way of creating a vested remainder to take effect after the termination of any number of equitable life estates.

*Underwood v. Curtis*, 127 N. Y. 523. This was in effect a gift of real and personal property to pay the rents and income to A, B and C during the life of A, and upon A's death, if the real estate was then sold, if not, then upon the sale of the real estate, to divide the estate into four parts and to transfer two of them to B and C absolutely, and the other two separate parts to hold in trust for one more life respectively. The trustees were authorized to sell the real estate at any time, and were obliged to sell it before the expiration of ten years. *Held*, that the trust was void, because it might continue for a fixed period of ten years. "The fact that the trust as to the entire property may, by the action of the executrices, be terminated on the death of the widow, is of no moment, if events may happen so that such estate may be extended beyond the statutory limitation." (P. 540). This is the same fallacy as in *Mc-*

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<sup>1</sup> Fowler's Real Property Law, pp. 180-1, 274-5.

<sup>2</sup> 1 R. S., 724.

<sup>3</sup> 1 R. S., 723.

<sup>4</sup> *Amory v. Lord*, 9 N. Y., 403. *Woodruff v. Cook*, 61 N. Y., 638.

*Sorley v. Wilson*, *supra*, resulting from not distinguishing between the suspension of the *power* of alienation (the only thing forbidden by the statute) and the mere suspension or postponement of alienation. This has often been pointed out and nowhere more emphatically than in *Robert v. Corning*, 89 N. Y. 225, which the Court in *Underwood v. Curtis* unsuccessfully attempts to reconcile with its own opinion. At page 239 the Court says: "But there can be no lawful perpetuity unless the *power* of sale is suspended, and the mere fact that it might be the duty of the executors, in the exercise of their discretion, to postpone the sale to await a more favorable market, does not, we think, constitute such a restraint as suspends the power of alienation within the statute."

*Stoiber v. Stoiber*, 40 App. Div., 156. Here was a trust to receive and apply the rents and profits during the lives of A and B, and, after the death of both, during the life of C, remainder to C's surviving children, but the trustees were empowered at any time, with the consent of the *cestuis que trustent*, to sell the trust property, in which case the testator apparently, according to the will and codicil as interpreted by the Court,<sup>1</sup> gave the proceeds to C's surviving children absolutely. Held, (1) that the trust did not involve a suspension of the power of alienation, and therefore did not offend against the statute. (2), *semble*, that the remainder limited in favor of C's children (including those not in being) was a contingent future interest, which might not vest until after the expiration of three lives, and therefore void under other statutory requirements. The only other statutory requirement cited is section 20 above considered, but this, as we have seen, applies only to a contingent remainder limited after a term of years. Such was not the character of the remainder in this case, and we submit that although the remainder might not vest within the statutory period and might in itself restrain alienation be-

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<sup>1</sup> It is not entirely clear how the Court interpreted the will and codicil. If the codicil is to be interpreted as providing for a trust to continue during three lives at all events, without power in the trustees to terminate it sooner, there can be no question that the rule was violated. But if such was the interpretation, the provisions of the will and codicil were bad, because the trust involved a restraint upon alienation beyond the statutory period.

yond that period, yet, if taking all the provisions of the will together, there was no suspension of the power of alienation, the rule was not violated. If the destructibility of a trust, which involves a restraint upon alienation while it lasts, prevents a violation of the rule, the possibility of determining a contingent interest, which may occasion a suspension of the power of alienation while it lasts, should also prevent a violation of the rule.

The conclusions of the writer may be summarized as follows:

I. There is only one rule against perpetuities.

II. According to that rule the sole test is the suspension of the power of alienation.

III. Trusts which do not involve a suspension of the power of alienation, and those which, although involving such suspension so long as they continue, may be terminated at any time, either by the trustee or by the *cestui que trust*, or by both acting concurrently, do not violate the rule.

IV. Future contingent interests, although they may not vest within the statutory period, do not offend against the rule, if they do not occasion a suspension of the power of alienation.

V. The only future contingent interests which occasion such suspension are those which are limited in favor of persons not in being and corporations not created, because all other contingent interests are alienable.

VI. Future contingent interests which do occasion such suspension are not bad, if there is a power vested in some person or persons by whom the contingent interests may be determined and an absolute title conveyed.

GEORGE F. CANFIELD.



## CORPORATE TRUSTS.

“CORPORATE trusts” to-day constitute one of the most interesting subjects of study for both bench and bar. The statute books are filled with legislation concerning them. The volumes of reports are filled with cases arising out of that legislation. Courts and counsel are busily at work in the attempt to solve the questions presented by what are termed “corporate trusts.”

But what are they?

Many attempts have been made to give a definition of the term “corporate trust.” It may seem almost a matter of presumption, to make another such attempt. Nevertheless the writer will lay himself open to the charge of rashness and over-confidence, by venturing on another of those attempts.

In its last analysis, it is submitted, that the term “corporate trust” involves no new fact, and no new legal idea. The “corporate trust” will be found, on careful consideration, to have no new feature, other than that of increased magnitude. It is nothing more than an aggregation of capital in the hands of a corporation, for ordinary business purposes, in order to compete with its competitors, to make money, by producing, buying and selling at the lowest price. Single individuals have for many centuries been business competitors. Business corporations, now for nearly a century, have been business competitors. Individuals and corporations, both alike, have used precisely the same methods, fair and unfair, honest and dishonest, lawful and unlawful. Both of them have for a long time, in the heat of competition, made numerous efforts to destroy their competitors. Long ago the common law made its decisions, as to what ones of such efforts should be deemed lawful, and what unlawful. The distinction between acts that were lawful and acts that were unlawful, from an early period, practically settled down to an application of the old maxim “*sic utere tuo ut alienum non lædas.*” In other words, every man, and every corporation, had the full right, from either the civil

or criminal standpoint, to make any use whatever of his own property, provided he was guilty of no interference with the corresponding right of other men to make the same use of their property.

Until recently, the courts found no great difficulty in solving all questions as to competition, and as to combinations, whether by laborers or capitalists, in restraint of trade or for other purposes. The law was well established, beyond reasonable controversy, that combinations, between any number of individuals, or between any number of corporations, were lawful, or rather, they were not unlawful, so long as they resulted in no overt act, which constituted a violation of some legal right, of some party other than the parties combining. No matter what might be the ultimate intent of a combination, mere intent had never been held to be a violation of law. Intent, when it resulted in an act, did often determine the legal quality of that act. But intent alone, without action, was not held to constitute a violation of law, civil or criminal. It was necessary, that there should be, in addition, an actual injury, an actual interference with some legal right of another. This was the well-established law; so well established, that it is unnecessary to cite authorities to the proposition.

But legislatures and courts, in these latter days, have thrown this principle and rule of law to the winds. They have done so in view of the danger, which, in their belief, has arisen from the large modern masses of capital, which in these last years have come under single separate corporate control.

The figures are, indeed, fitted to cause wonder. The capitalizations of some of our modern industrial corporations are beyond all comparison with anything in the business world of former periods. It is evident, too, that large combinations of capital, for the purpose of controlling manufacture and markets, are to-day more numerous than they have ever been before.

But is there really any essentially new feature in the situation which arises from these large modern combinations? Have they really made any essential change in industrial methods, or industrial conditions? Have they really brought into our modern business world any new

dangers? To go one step further, if there are any new dangers, what is the wisest policy by which we are to meet those dangers?

The answers to these questions will involve some consideration of economic conditions.

Dread of the control of markets, by the use of large amounts of capital, is no new thing. The possibility of being compelled to pay exorbitant prices for articles of daily use, especially for food products, is one which has existed for centuries. The fear has always been that the prices of many articles of merchandise, and especially of food products, would rise to such a point as to cause want, and possibly starvation, among large portions of the population.

But no serious rise in prices has ever come from that cause. History shows that, notwithstanding the fact that producers and speculators have made innumerable attempts to raise the prices of all kinds of merchandise, every rise in prices which has ever been accomplished by those men has been very limited, in both locality and time. It has never done any serious injury. The reason is, that success in any such venture is made a practical impossibility by the unvarying laws of commerce. Such ventures invariably defeat their own purpose. The first attempt to raise prices results in a curtailment of purchases. Purchasers wait for prices to go down. They use other things. They go without. If speculators put up the price of wheat, people eat potatoes, or corn, or rice, or any one of the numberless other food products. If speculators put up the price of wool, people use cotton, or wait till wool goes down again. Meantime the interest account is always running, and that fact soon brings the speculators to their bearings. The "cornering," as it is termed, of any product involves the purchase of practically the entire marketable supply of that product. That involves, especially to-day, the use of large amounts of money. Almost invariably it compels large borrowings. In either way it involves the loss of large amounts in the way of interest. The object of these ventures is, of course, the profit to be made on sales. But sales cannot be made, except at prices which purchasers are willing to pay. It takes two to make a bargain. So that it has invariably

been the case that these speculative efforts to put up prices have quickly come to an end. They have seldom done any considerable harm. As a rule, the only persons who are seriously injured are the speculators. They are entitled to small sympathy. They are, almost invariably, the only sufferers.

But it is thought by many men, that some new feature is introduced into the situation to-day, by the creation of these large modern corporations, which own and control these large modern combinations of capital. We have invented a new name for these combinations. We call them "trusts." The new name has given rise to a new terror.

But is there really any feature in the problem which is essentially new?

A satisfactory answer to this question requires a statement of some of the facts as to recent industrial development.

The extensive use of the corporation, in the industrial and financial world, can hardly be said to go further back than the earlier part of the nineteenth century. Prior to that time the world's industries and its commercial operations were conducted on a smaller scale. Corporations had been formed and used mainly for political and charitable purposes. Towns, cities and states, were different forms of municipal corporations. Church institutions, colleges, schools, and hospitals were generally owned and conducted by charitable corporations. But with the increased use of machinery, which began in the early part of the nineteenth century, the amounts of capital required for manufacturing and other business purposes led gradually to a great increase in the use of corporations. This increase became continually greater with the growth of scientific knowledge, and the consequent increase in the power of man over the material forces of Nature, especially with the modern development of the new forces of steam and electricity, and the consequent increase in the use of coal and iron, for the purposes of manufacture and transportation. When each separate farmer's family made its own wool into cloth and clothing, when mankind generally used only hand tools, before they began to use what we term machinery, there was compara-

tively slight need of our modern large combinations of capital. But with the continued increase in man's knowledge of the great forces of Nature, with the continued development of new manufacturing processes, and the consequent enlargement of the masses of men, money, and material, required in the organization and operation of our great modern industries and systems of transportation, it is easily seen that the corporation became an indispensable necessity in the modern industrial world. Our immense modern combinations of men, material, and capital, without the use of corporations, are an impossibility. Without these great industrial, transportational, and financial corporations, the modern industrial world must come to a standstill, and modern civilization could not exist. Without these great corporations, with their great masses of capital, it is a practical impossibility to construct and operate our large railroad systems, or our large manufacturing plants, without which we must revert to the petty processes, and the petty methods of the middle ages. Men revile corporations, and resort to every possible method to annoy them, and impede their transaction of business. But they do so without due study and thought. Corporations are an absolute necessity to our modern industrial world. Every one of these great instruments, whatever be the wishes of its controllers, is compelled to be the servant of society. The larger the mass of capital, the more complete is the financial necessity, which compels its owners to keep it in constant operation, and to sell its products at prices which purchasers are willing to pay. The owners of these large masses of invested capital cannot afford to allow the capital to lie idle. It must be earning dividends. It can do so only by making large sales of its product. Experience shows that there is only one way to do this, and that is by giving low prices. Consequently the universal experience is, that whatever be the original purpose of the magnates who form these large combinations of capital, the invariable result is, in time—and in no long time—to put down prices. The reason is, that the lowering of prices always increases profits. So it happens, in a way that seems almost mysterious, that although the purpose of the men who form the large modern "corporate trusts" is invariably the suppression of competition, with a

large resulting profit to themselves, they always in the end secure that profit by conferring a benefit on the community at large in the shape of lower prices.

It may be said, that the creation of these large masses of capital involves a pernicious result in the suppression of small competing individuals.

That result may be conceded. Success in cheapening production, resulting in a consequent lowering of prices, whether by corporations or individuals, always results for the time in loss to competitors. That is the law of industry. Shall we therefore put an end to the lowering of prices, which must almost always come, as all experience shows, only from the processes of consolidation and concentration?

To this question there can be but one reasonable answer. Consolidation and concentration must go on. The single individual who is undersold, must betake himself to some other employment—either as a subordinate in his former line of work, or in any capacity he sees fit in some new line. Even he is not injured permanently. But even if he were, we must have industrial progress. The single individual must change his methods. There is in late years too much sentimentality over the individual. As matter of fact, the individuals who fail at one calling betake themselves to some other. In one way or another, those of them who are honest and industrious, in the long run, get a living.

The conclusion then is, at this point of our study, that these large aggregations of capital, which to-day we term "corporate trusts," are an absolute necessity in our modern industrial world; that they result, in the end, in large benefits to the community; that the evils incident to their creation are the necessary results of competition in any form, whether between corporations or individuals; that the only new feature in these new aggregations of capital is their magnitude; and that, consequently, they introduce in the industrial and legal world no new feature in kind, but merely in degree.

Consequently, there would seem to be no new legal problems. The old, well-established principles, and the old, well-established rules, would seem to be quite adequate to the situation.

But, it may be said, corporations have their advantages, but they have, on the other hand, their disadvantages. It may be said, these vast combinations of capital put too much power in single hands. The power may be used for evil, as well as for good. The concentration under single control of these large aggregations of capital is therefore a circumstance full of peril.

What is there in this position?

No doubt, the greater the power, the more serious may be the consequences of its abuse.

But what are the real disadvantages, and the real dangers? Have we here anything really new, or any really serious danger?

In considering this point, men generally lose sight of the fact, that these large combinations of capital exist in many different departments; that the increase in the amounts of capital has taken place in enterprises of all kinds; that all these different combinations of capital have a diversity of interest; and that the amounts of capital in different directions, and in different industries, have increased in the same proportion. No doubt, if all the capital in the world, or in a single country, were under a separate single control, or if all the different combinations of capital had a unity of interest, then the situation would be different, and would be one which might reasonably excite apprehension. But these different combinations of capital are not under single control. They have a complete diversity of interest; and are continually in a position of antagonism.

In short, there is no essential change in the industrial or legal situation, resulting from these large masses of capital, except one which goes through all industrial and financial interests alike. Modern civilization, and modern industries, throughout, are on a larger scale. The increase in masses of capital has been universal. One industry has grown as much as others; and the diversity of interests remains as it was. Combinations of capital have grown in all directions. But so, too, have combinations of labor. The increase of power has been the same everywhere. There has been nothing but a universal increase in volume, in every department of human industry.

To take the situation from a slightly different standpoint:

The dangers from these large combinations of capital look in two directions; if they threaten any one, they threaten two classes of persons, purchasers, and employees.

Now it is a singular fact, that the history of the modern industrial and financial world shows, on the one hand, that there has been a steady decrease in the profits of capital, accompanied by a steady decrease in the prices of manufactured products; while on the other hand, we find a steady increase in the wages of labor. And then, to supplement these facts, we have the other one, already mentioned, of the absence of a single instance where either capitalists or speculators have ever been able to make any considerable advance in prices, for any considerable time.

Really, when we consider the fact that men in the English world, according to the record, have been dreading this rise in prices, and the evil results to purchasers and employees, now for upwards of six centuries, ought not the dire spectre to have materialized by this time, if it is ever to do so?

The spectre never will materialize. The danger is not a serious danger. No doubt, there will be many individual instances, where a reduction of wages by employers, or a temporary advance in price, by a producer or a speculator, may cause temporary inconvenience to a small number of individuals. But such temporary inconveniences are not to be considered by the economist, or the jurist. The employee has his protection in his right to seek other employment. The purchaser has his protection in his right to refuse to purchase, unless at a price which commands his assent. Any such temporary inconveniences to either employees or purchasers, which are caused by the employers or producers, are not considerations which give the right to the legislator, or the judge, to interfere with the complete freedom of contract allowed by law—provided the capitalist refrains from unlawful interference with freedom of contract and freedom of action on the part of others.

That brings us to the real point of this whole discussion. What is unlawful interference with the rights of others? Every business man, every business corporation, transacts business with the purpose, with the lawful purpose, of competing with his rivals, of cutting down his own prices, and



getting his business advantages at the expense of other competitors. And, so long as he does this by honest and lawful means, he violates no law. That is the order of Nature. In order to secure the highest activity of man, and the highest development of man, it has been found necessary, with advancing civilization, that every man should own, and enjoy, the proceeds of his own labor; in other words, that he should have property. It has also been found necessary, by experience, that the owner of property should have its absolute control; that he should have complete freedom of action, as to its use and sale, so long as he does not infringe on the same freedom of action on the part of others. Healthy individual industrial activity can be secured, only by giving the fullest protection to property; which means, the giving to the owner of property the most complete freedom, in its use and sale, so long as he does not encroach on the same rights of others.

Here we come to some of the fundamental principles of the law.

It is of the very essence of property, that its owner should have utter and absolute freedom of sale; he must have the absolute power of deciding, whether he will sell it at all, and of fixing its price, in case he decides to make a sale. In other words, the *jus disponendi* is one of the essentials, in the idea of property, under any system of law, that deserves to be called civilized. The right of taxation is one thing. Under the right of taxation, whenever the State needs money, that money can be raised by taxation, even if it takes the citizen's last dollar. The right of eminent domain is another thing. Under that right, whenever the community requires any specific piece of property of a private owner, for public use, it can make a forced purchase of that property, and is not compelled to accept the price fixed by the owner. But whenever a private individual wishes the property of another owner, he must pay the price fixed by that owner. Neither any would-be purchaser, nor the State, has the right to interfere, directly or indirectly, in the most remote degree, with the right of every owner of property, in his dealings with other private individuals, to fix his own selling price, and to decide whether he will make a sale at any price. Absolute

freedom of contract, in all private employments, with all private individuals, is the first essential of property.

These positions are perfectly well established under our law. But it is these fundamental essentials in the law of property, that are questioned, and completely ignored, in many recent statutes passed by our legislatures and in many recent decisions of our courts. These statutes and decisions, it will be found, really rest on the assumption that private individuals, or that collection of private individuals which we term the public, has some kind of a legal right to compel the owner of breadstuffs, or fuel, or clothing, to sell them to other private individuals at what are termed "reasonable prices."

There is no such right. The owner of food and fuel has the absolute unlimited right, precisely as in the case of property of other kinds, to sell at his own price, or not at all, on his own free will. A man owns his wheat or his coal precisely as he owns his other property, because he has earned it and paid for it, or because his father has bought it and paid for it. If any other man wishes it, he in his turn must buy it and pay for it. The State can take it for public use, and, in so taking, it can compel the owner to make a sale at a price that is reasonable. But no such right exists in favor of any private individual, or of any collection of private individuals, to be enforced by proceedings in their own name or in the name of the State, civil or criminal, directly or indirectly. In other words, in case of a sale of private property, of land, labor, or what is commonly called personal property, by one private individual to another, each party to the transaction, vendor and purchaser, is entitled to his free equal voice in fixing the price; and no governmental power has the lawful right to interfere, directly or indirectly, with that freedom.

Men talk of the obligation of the seller to sell at "reasonable" prices. But how has the buyer any rights superior to those of the seller? If the State is to protect buyers against high prices, it must also protect sellers against low prices. The one has the same rights with the other. It is easy to see that the contention, that the buyer has any right to special State protection, must concede the same right to the seller, and must result in the affirmance of a right in the

State to interfere in any and every contract of sale, at least of what are termed staple articles of daily use, for the purpose of fixing prices. No such doctrine can be maintained. Property in wheat and coal is as sacred as property in labor. The law, rightly declared, knows no distinction between them.

It may be conceded that the principles here stated are, in their fullness, of comparatively recent origin. The right of the Legislature to regulate prices on sales by private individuals to private individuals, of property and labor alike, was in former times assumed and asserted, both in England and in this country. And the denial of the right has been a thing of comparatively recent origin. Statutes regulating the prices of labor, of wheat, wool, coal, and merchandise of all kinds, abound in the British Statutes at Large. Legislation as to prices in very singular forms is to be found in the legislative records of several of the colonies during the Revolutionary War.

But so far as my reading goes, no legislation can be found on the statute books of the different States since the Revolutionary War, which asserts directly the right of the State to fix prices on private sales of private property. The right of the State is still asserted, and maintained by the highest judicial authority, to fix and regulate prices in what are termed "public employments," employments "affected by a public use," such as the operation of railroads and other public highways, the supply of gas and water, the transportation of information by telegraph and telephone companies, and of passengers and merchandise by common carriers, the operation of grain elevators, public slaughterhouses, mills and others which need not be specifically mentioned (*Munn v. Illinois*, 94 U. S., 113, and other cases). But in what are termed "private employments," employments not "affected with a public use," the right of the State to interfere with prices, directly or indirectly, does not exist. In all private employments the right of the seller to fix his own price is absolute and unlimited. Buyers have no other or greater rights than sellers.

From this position, that every seller in a "private employment" has the right to fix the price at which he will sell, acting independently on his own motion, it would seem

to follow logically that every seller should have the legal right to fix his prices by agreement with other men. The mere fact of combination, on the part of two or more individual sellers, by an agreement which goes no further than to fix the selling prices of their own products, a thing which any and all of them could lawfully have done as individuals with regard to their respective holdings, surely adds no unlawful element to what was, before, strictly legal, and is as surely no violation of the legal rights of any party outside of the agreement. It is true that the law will not enforce the agreement as between the parties to it. But the making of the agreement, or its performance, involves no violation of the rights of other parties. The sole legal consequence is, that the law will not enforce it against one of the contracting parties at the instance of the others.

In the case of labor, these points have been decided over and over again. As to both labor and capital, they were practically unquestioned until very recently, since the beginning of the alarm over "trusts." Utterly beyond question, on principle and authority, is the legal right of the sellers of labor, whom we term employees, to combine and agree on the price at which they will sell it. But buyers of labor, whom we term employers, have precisely the same rights with the sellers of labor, whom we term employees. So, too, the buyers and sellers of merchandise stand on exactly the same legal footing. The law should give to each absolute and complete freedom of contract, including absolute and complete freedom to contract with other sellers in an agreement to fix the selling price of their own property. In other words, absolute freedom of contractual combination, as to the selling price of their own property, is logically a property right of the owners and sellers of merchandise, precisely as it is of the owners and sellers of labor.

Let us look at the situation from another standpoint.

The right of the sellers of labor, of employees, to agree with other labor sellers as to their own selling prices, as has already been stated, is to-day beyond question. Practically, in every food product, the greater part of the price consists, in one form or another, of the price of labor. Take, by way of illustration, the cost of a barrel of flour. The cost of the original wheat, in the hands of

the farmer who raises it, is mainly the cost of labor. At its next stage, in the flour mill, there has been added the cost of cartage and milling, again the cost of labor. At the railroad station there has been added the cost of more labor. Finally, when it comes to the consumer, the increase in successive prices consists almost entirely in successive additions of the cost of labor. In fact, in the case of nearly every article of merchandise, food product or other, whether a necessary of life or a luxury, by far the greater part of its cost is the cost of labor.

In every such case each successive vendor has acquired, by purchase, the results and the rights of former laborers, and has added thereto the results and the rights of his own labor. Each successive owner has been a purchaser of the results of the labor of other men before he becomes a vendor. Concededly, at every successive stage of production the laborers have the right to agree in combination as to the price of their own labor. Can it be denied that the same right exists in favor of the so-called merchant or capitalist, who buys the product of labor, and who adds thereto his own labor and the use of his own capital? On what basis of reason, or justice, or common sense, can we draw any legal distinction between the rights of contractual combination, which belong to the sellers of labor, and the same right on the part of later sellers of the products of that labor, called merchants or capitalists? Legislatures and courts have been losing their heads. Our law knows, or should know, no distinction of persons. Capitalists and laborers have the same legal rights.

Still another position should be stated.

The distinction between the combination rights of employers and employees, of capitalists and laborers, not only has no justification in law, but it rests on no sound distinction in economic fact. Every man is both capitalist and laborer, just as every man is both buyer and seller. The poorest day laborer is, to some extent, a capitalist. He owns his clothing, his household furniture, such as they are, and his own skill, which gives his labor its selling value. On the other hand, every capitalist is a laborer, and is often the harder laborer of the two. It may be that he does little or no work with his hands, and works in a luxuriously ap-

pointed office. Nevertheless he is a laborer. His labor is given to the study of investments. His work is work of the brain, a harder and more exhausting work than the work of the body. Moreover, it is the capitalist who has the greater part of the worry. And it is an old saying as well as a true one, that more men are killed by worry than by work. In short, the difference between the capitalist, so-called, and the laborer, so called, is one, not of kind, but of degree and proportion. The capitalist owns capital in a larger proportion than the man whom we term a laborer. The laborer works with his hands, in a larger proportion than the man whom we term a capitalist. In reality, in every industrial enterprise, the capitalist and the laborer are partners. Neither one of them can work alone. Consequently, they work together. They share profits. But in this way ; the laborer, in general, takes his profits in the form of wages ; and he takes them as he goes along, day by day, with practically no risk of loss. The capitalist, on the other hand, in general, supplies all the money in advance, takes all the risks of loss, and waits for his profit till the enterprise is completed. His profits may be large, or small ; or he may suffer heavy losses.

So it is, then, that every capitalist is a laborer ; every laborer is a capitalist ; and in every industrial enterprise they are really partners, making their division of profits in each case according to their contracts, as to which the law, and justice, give, or should give, to each the same absolute contractual freedom.

Let us add still another point. It is often said that the laborer is at the mercy of the capitalist, and is consequently the victim of capitalistic oppression. As a statement of the general situation, nothing could be further from the fact. No doubt, there are many instances of oppression of laborers by capitalists. But there are just as many cases of oppression of capitalists by laborers. Taking the situation as a whole, however, if either party is at a disadvantage, the power of the laborer, at least under modern conditions, is the greater, by reason of the great increase in modern times in the ease and completeness of combination on the part of laborers. The laborer always has at his

command the machinery of the strike. The employer almost always finds it impossible—in practice—to replace any large number of strikers with other employees. The larger the amount of capital employed in any single industry, the more largely is the employer in the power of his employees. For his loss from an interruption of business is larger ; it is more impossible for him to obtain and organize an entire new working force. In the case of a small employer, having only a small number of employees, it is a matter of comparative ease for him to get new men, and to train them to their work. But in the case of a large mill or railroad, or any of our immense modern establishments, with their large armies of employees, combination on the part of the employees is comparatively easy, while it becomes a practical impossibility for the employer to replace his large body of employees of workmen, foremen and superintendents, with a trained and organized force of new men.

The current idea, therefore, that the increase in the amount of capital invested in a single industry makes an increase only in the power of the employer over his employees, is a mistake. The greater increase in power lies on the other side. The larger the amount of capital involved in any single industry, the greater is the loss from any interruption in its use. The larger the operations, the more delicate and full of danger is the position of the capitalist employer. Here, too, we must take into account other facts, the increase in intelligence, at least in this country, with all classes of workmen, and the increase in the ability of the workmen to get other employment, and to get assistance in a strike from other laborers. The trades unions have made a change in these respects, which has not been duly estimated.

Is it not evident, from a consideration of these facts, that no good reason can be found for a discrimination as to legal rights against the capitalist, based on the economics of the situation?

Let us see what is the situation as a matter of legal authority.

It is necessary to state, at the outset, that it is an absolute impossibility to reconcile all the decisions of the courts

on the points here considered and stated. Nor is it possible, in a single paper in a review, to do more than state a series of positions, each of which is sustained by the highest authorities in the English and American courts. But opinions of judges in large number, especially within the last few years, can be cited in opposition to each one of these positions.

It should also be noted, that the legal positions here stated embody much more than mere declarations of courts as to what the law is. They are also the well-considered judgments of the greatest jurists in England and America, as to what the law ought to be, in order to ensure the fullest protection, in all his legal rights, to every citizen, high or low, rich or poor, capitalist or laborer. To quote the language of Chancellor Kent:

"A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the *dictates of natural justice and of cultivated reason to particular cases*. In the just language of Sir Matthew Hale, the common law of England is, 'not the product of the wisdom of some one man, or society of men, in any one age; but of the *wisdom, counsel, experience and observation of many ages of wise and observing men*.'"

Let us now state the legal propositions, which are established by the highest English and American authorities.

Those propositions are as follows:

I.—At common law, a mere combination to raise or maintain prices, of the property of the parties combining, constituted no violation of the rights of other individuals, or of that collection of individuals which we term the public.

This point must be considered as having been finally and conclusively settled both for English and American courts and legislatures by the case *Mogul Steamship Company v. McGregor*, Appeals Cases, 1892, p. 35. This case may possibly not be an authority in this country for all purposes. It certainly is a conclusive authority, for our courts as well as English courts, as to what was the English common law. And the case decided, that a mere combina-



tion to regulate the prices of the parties combining, although its object concededly was to drive others out of the trade and in the end destroy competition, constituted no violation of any legal right of others.

Seldom, if ever, has any case had such an exhaustive and able consideration. It was heard in the first instance on a motion for an injunction before Lord Coleridge, then went to the Court of Appeals, and thence to the House of Lords. There were ten opinions in favor of the proposition here laid down by the ablest jurists in England. There was only one dissenting opinion, by Lord Esher.

It must then be considered as conclusively decided, that a mere combination to raise or maintain prices of the property of the parties combining constituted no violation of the legal rights of any other person at common law.

No doubt such a combination will not be enforced by the courts. To that extent it may be said to be unlawful or void. But at common law the combination works no legal wrong, no legal injury to the rights of others than the parties combining.<sup>1</sup>

II.—The English statutes, which made such combinations criminal, did not form part of the law of our American colonies or of the States.<sup>2</sup>

III.—In this country neither legislatures nor courts have the lawful power to interfere with the absolute right of every owner of property, not employed in a "public occupation," to fix his own selling price with other private individuals, whether independently or in combination with other sellers. Especially, they have no legal power to make such fixing of price by combination with other sellers a crime.

It will be universally conceded, that the powers of legislatures or courts in declaring what may constitute a crime, are subject to some constitutional limitations.

If so, what are those limitations?

If there be any such limitations whatever, certainly one of them must be this, that no man can be lawfully deprived, directly or indirectly, of his absolute right to fix the sell-

<sup>1</sup> See, too, *People v. Fisher*, 14 Wendell, 19.

<sup>2</sup> *Commonwealth v. Hunt*, 4 Metcalf, 111; opinion by Chief Justice Shaw. *Commonwealth v. Carlisle*, Brightly, 36.

ing price of his own property, of his absolute *jus disponendi*.

As to the existence of the right to fix his own price by his separate individual action there can be no reasonable controversy. And it can make no difference, as a matter of law, whether the property be real or personal, whether it be land, merchandise, or labor. The rights of property, beyond the possibility of controversy, involve the right of possession, the right of use, and the right of sale, the *jus disponendi*. One is as essential as the other. One is as undoubted as the other. The control of the owner is absolute. In the words of Blackstone, it is "that sole and despotic dominion which one man claims and exercises over the external things of the world in *total exclusion of the right of any other individual* in the universe" (2 Blackstone Com., 2).

The law on this point is thus stated in *Wynehamer v. The People*, 13 N. Y., 378, 396: "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com., 138): 'The third *absolute right* of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, *without any control or diminution*, save only by the laws of the land.' Chancellor Kent says (2 Com., 320): 'The *exclusive right* of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' \* \* \* \* \* These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."<sup>1</sup>

And it was in that case held, that any attempt to interfere with that absolute exclusive right of sale was unconstitutional, and beyond the power of the legislature.

As stated before, if the needs of the State require the possession or use of any property of an individual, then the

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<sup>1</sup> NOTE.—The italics are the writer's.

State can take that property under the right of eminent domain. Under the power of taxation, it may take a man's entire property. But no power whatever, that is, no lawful power, whether of the State or of an individual, can interfere with that absolute control in favor of other individuals. The raising or maintaining of prices, then, by a single individual violates no legal rights of other individuals or of the State.

IV.—The same is true in law as regards a combination of individuals.

The reason is that other individuals than the parties combining have no rights in the premises to be violated. They have no legal right to demand a sale of the property of the combining parties, at a reasonable price, or at any price.

But under our law there can be no crime, unless there is a violation of some legal right of some individual. In the language of Blackstone, "In all cases the *crime includes an injury*; every *public offense is also a private wrong*, and something more; it affects the individual, and it likewise affects the community" (4 Blackstone Com., 5). So, too, Serjeant Stephen in his "New Commentaries on the Laws of England" says: "*A crime is the violation of a right*, when considered with reference to the evil tendency of such violation, as regards the community at large. The distinction of public wrongs from private, that is to say, of crimes from civil injuries, seems upon examination to consist principally in this, that private wrongs (or civil injuries) are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals, while *public wrongs* (or crimes and misdemeanors) are a *violation of the same rights* considered with reference to their effect on the community in its aggregate capacity."

Until lately it has not been questioned that every crime must involve, in its very essence, the violation of some legal right of some individual.

Consequently, if no individual in the entire community has any legal right which is violated by a combination merely to raise the prices of the property of the parties combining, such a combination cannot constitute a crime.

This point was quite free from doubt until the advent

of this modern mania over "trusts," over these large combinations of capital. It had been decided, time and again, that combinations of laborers, merely to fix the prices of their own labor, constituted no violation of law, civil or criminal. Owners of merchandise have the same rights of full protection to their own property with the owners of labor. If all the courts in Christendom were to say the contrary, it is utterly unreasonable, and unlawful, to refuse to the owners of merchandise the same rights of property, and the same rights of combination, that are ensured to the owners of labor.

As to combinations of individuals, then, it is submitted that the law is well settled, so far as it rests on reason and on authority, notwithstanding some recent statutes and decisions of the courts.

V. The law as to combinations is the same with corporations as with individuals.

Corporations have the same right to fix the selling price of their own property as individuals, either separately, or in combination with others.

The reason why an individual must have the absolute power of fixing the selling price of his own property is that any other rule deprives him of one of the chief of his property rights; it deprives him of property "without due process of law."

The same rights, founded on the same reasons, exist in favor of corporations.

A corporation, so far as concerns the points here under consideration, is nothing but a combination of individuals, an artificial individual, and, as such, an owner of property. As such an owner of property, it has the same property rights, including the absolute *jus disponendi*, the right to sell or not to sell at its own free will, with the same right to fix its own selling price.

It is submitted, therefore, that corporations which are organized for the purpose of producing and buying property have precisely the same absolute and exclusive right to control the sale of that property that belongs to individuals. They have the same property rights, and those rights

are entitled to the same protection at the hands of the law.<sup>1</sup>

We are to bear in mind continually that, in cases of "public employments," carried on by either individuals or corporations, the State has the power to regulate prices. We are to bear in mind, also, the point that combinations for the purpose of interference with the industrial freedom of others, whether by corporations or individuals, involve violations of legal rights. But the mere refusal to sell below a certain price, or the refusal to sell at any price, whether by one individual or by a combination of individuals, or by one corporation or a combination of corporations, violates no legal rights of others. Of such combinations Lord Bowen said, in the *Mogul Steamship* case, and his statement of the law has been approved by all the ablest jurists in our own courts, until within a few years: "But what is the definition of an 'illegal combination?' It is an agreement by one or more to do an *unlawful act*, or to do an unlawful act by an *unlawful means*." Later in his opinion he says: "It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—would be another method of attempting to set boundaries to the tides." Lord Fry said: "In all cases, therefore, a conspiracy is an agreement to do an unlawful act." In other words, it must be something more than a combination to regulate the prices of the property of the parties combining. To so regulate prices, in private employments, their right is absolute.

In conclusion, it is submitted, that the following additional propositions are correctly stated:

I. Corporate trusts are nothing but combinations of capital in the hands of corporations.

Consequently, they involve no new economic fact.

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<sup>1</sup> *Santa Clara County v. Southern Pacific Co.*, 118 U. S., 394, 396. *Covington, &c., Co. v. Sandford*, 164 U. S., 578, 592; *Smyth v. Ames*, 169 U. S., 466, 322, and many other cases).

II. Corporations have the same right to the absolute control of their own selling prices, of labor or merchandise, with individuals.

They have the same property rights.

Those rights are entitled to the same legal protection.

III. Corporate trusts, consequently, introduce no new legal problems, and the old principles and remedies of the law are adequate to the solution of all questions which may arise, either as to the legal rights of these "corporate trusts," or any legal wrongs which they may do to others.

ALBERT STICKNEY.

# COLUMBIA LAW REVIEW.

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## NOTES.

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PROPERTY—PARTY WALL AGREEMENTS—IMPLIED CONTRACT THEORY.—The case of *Lincoln v. Burrage*, just decided in Mass. (see RECENT CASES), raises again the interesting question of party wall agreements. While no good reason would appear for doubting the soundness of the decision, plaintiff's counsel in his argument relied strongly on *Irving v. Turnbull*, L. R., 2 Q. B. (1900), 129. The holding in this case is so novel, and the theory involved so far reaching, as to merit consideration, both in its general aspect and in its application to the case at bar. The facts there were as follows:

X, the owner of adjoining lots, sold them to A and B respectively, each covenanting with the vendor that all division walls should be erected half on his own, half on the other lot, and that when one purchaser used the wall that another purchaser might thus have built, the former would pay the latter half cost. A built on his lot and sold it to C, before B purchased the other lot from X and used the party wall A had so built. C sued B for half the cost of this wall, and the plaintiff had to recover, if at all, independently of any recognized doctrine as to the benefit or burden of a covenant running with the land. Considering for the moment only the covenant between X and A, once X had conveyed to A and covenanted with him, the case stood as one of covenants between adjoining

landowners. Neither in England, where the only privity is that of landlord and tenant, nor probably even on the peculiar American theory of dominant and servient tenement, was there sufficient privity to allow the burden of the covenant to run from X to B. While even the running of the benefit, as involved in the transfer from A to C, would present difficulty in some jurisdictions, such a covenant being held purely personal to A as touching not his land but that of the defendant. *Cole v. Hughes*, 54 N. Y., 444 (1873); *Gibson v. Holden*, 115 Ill., 199 (1885). In England, on the other hand, the beneficiary of a contract cannot sue, and C had no rights on the covenant subsequently entered into between X and B. Hence the problem confronting the Court was how to find sufficient privity of contract to allow a recovery. A recent article (14 *Harv. Law Rev.*, 297), while condemning the reasoning of the Court, advocates a recovery by the plaintiff on the theory of covenants running with the land. Where such an agreement, it was said, has regard to any wall that may be built, and not to a specific wall, it is a continuing covenant, encourages the adjoining owner to build, or rebuild if the first wall is destroyed, leads to the improvement of the land, and should not be deemed a burden or precluded as such from passing to the vendee. We venture to think the average business man would be surprised at a theory which characterizes as beneficial to his land a restriction pecuniarily injurious to himself as owner. The agreement, it is submitted, really benefits the land of him who has built the wall and is entitled to the money; as to the other lot it is properly a burdensome restriction. Thus this theory is unsatisfactory, and we are led to examine the reasons advanced by the English Court, for on these, if at all, is the case to be supported. The argument is briefly as follows:

The defendant, it is said, by his contract with X had clearly intended to make himself liable to *some one*. While the plaintiff had acquired from A both the latter's "license" [easement?] to build and maintain a wall on the adjoining land and his right to be paid therefor. Hence, the circumstances were sufficient to raise a privity and an implied contract between the plaintiff and the defendant at the moment of the user of the wall by the latter. The weak spot in the reasoning is that it fails to show any consideration by plaintiff for defendant's promise to pay, and it would seem that none can be shown. But the interesting point lies in the fact that equity would certainly have decreed specific performance of a restrictive covenant under exactly similar circumstances, and the Court is apparently seeking to apply to affirmative covenants at law the doctrine which obtains in regard to restrictive covenants at equity—that they will be enforced against the covenantee or his assignee with notice in favor of any third party holding the land meant to be benefited thereby, whether he previously had knowledge of the restriction or not. But the doctrine of equitable easements as developed rests on no theory of contracts, and it would seem at least a questionable step to extend the principle there involved to actions at law.

Assuming, however, that *Irving v. Turnbull* is correctly decided,



it does not control *Lincoln v. Burrage*. The defendant in this case had never contracted with any one unless the covenant of his vendor ran with the land, while the plaintiff no longer retained any interest in the adjoining property. The Court which decided *Irving v. Turnbull* would doubtless have held the same as the Supreme Court of Mass.

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**INSURANCE.—ONE YEAR TERM POLICIES.**—Few decisions of recent years have so excited the interest of life insurance people as that of the *Bankers' Life Insurance Company of New York v. Insurance Commissioners*, 48 Atl.—, decided January 30, 1901. The Supreme Court of Vermont granted a mandamus to license the petitioners to do business in Vermont. The statute of that State directs that a foreign insurance company shall be licensed only after the company has proved that it possesses *inter alia* assets equal in amount to its outstanding liabilities "reckoning the premium reserve on its life risks based on the Actuaries' Tables of Mortality, with interest at four per cent., as a liability." V. S., § 4178. The petitioners claimed that their policies were so worded as to amount to two contracts, viz., a one year term policy and a life policy to commence one year from date. This first year term policy, the company claimed, required no reserve. The difference between "term" and "life" insurance is most important. In the former, the policy holder is insured only during the term, with no right to renew the contract at the same rate. Thus, a man who insures his life annually, by one year terms, would pay rapidly increasing premiums each year, whereas if he takes out a life policy he starts at a much higher rate which, however, remains uniform. In life insurance a company insures a rapidly increasing risk at a uniform rate by collecting a reserve, when the policy begins to run, sufficient to bring the premiums up to the cost of insurance when the policy and the insured are old. The commissioners had refused to license the petitioners on the ground that the policies in question were, in fact, life policies, requiring a reserve from the first year. The obligations and rights of both parties were identical with those in the ordinary life policy; therefore, to call the first year a term policy was a mere misnomer, (1899 Vt. Ins. Com. Report, p. 12). Chief Justice Taft, in delivering the unanimous decision of the Court, paid little, if any, attention to the contentions of counsel of either of the parties and decided the case on points not raised by counsel in their briefs or in argument. He said that the spirit of the statute was directed against insolvent companies, and that the premium reserve was no test of a companies' actual solvency. Actuarial science required that all companies must collect a reserve to meet the increasing risks of life insurance, but it made no difference when this reserve was collected. To require a young company to accumulate a sufficient reserve during its first year would be to smother it in its swaddling clothes. The petitioner's interpretation of the statute "would create such monopolies that the modern trusts would blush for their departing laurels." From a legal point of view it is unfortunate that

the learned justice did not rest his decision on more legal grounds. His reasoning based upon public policy and business necessity should be well considered by legislatures before any further statutes similar to that in Vermont are passed. The time-honored custom which requires a premium reserve during the first year of a life policy would seem to be of doubtful propriety. If the premiums are so arranged that a sufficient reserve must of necessity be collected before the annual risk becomes larger than the annual premium, why need this reserve be collected at any particular stage in the life of the policy? But this is not the reasoning of the statute, which must refer to the time-honored method of reckoning reserves. The policies of the petitioners were drawn in order to avoid what they considered an unjust statute and they rested their claims on the peculiar form of their policy. Their contentions are strong and had the decision been rested upon them, it would probably carry more weight. It would show the uselessness of trying to compel a company to collect its reserve at any particular period in the life of the policy—a company can issue term insurance to cover any period during which it does not want to lay up a reserve. It cannot do this for any great length of time, because the reserve on a policy must be collected sometime before the risk equals the annual premium, and it would be impossible to accumulate enough if the number of years were cut down beyond a certain limit. The company should merely be required to show that it is collecting enough to have a reserve on hand for each policy before the annual risk equals the annual premium.

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**BANKRUPTCY—REVOCATION OF DISCHARGE.**—If it be shown that a discharge was “obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioner since the granting of the discharge, and that the actual facts did not warrant the discharge,” the District Court will, by Section 15, revoke the discharge. The Act of 1867, Sect. 34, was construed to mean that a discharge was to be set aside only because of new evidence which, if known at the time, would have prevented a discharge, and the fair import of the 1898 Act is that, primarily, the fraud urged should not be open to the plea of *res judicata*. In the case *in re Hoover*, 5 Am. B. R., 247 (E. D. C., Pa., 1900), the Court makes considerable point of fraud in obtaining the discharge as the only ground for a revocation. Judge BROWN, *in re Meyers*, 3 Am. B. R., 722 (S. D. C., N. Y., 1900), said that the same facts which would have prevented a discharge constitute a fraud in the procuring of the discharge. Judge LOWELL, *in re Rudwick*, 2 Am. B. R., 114 (D. C., Mass., 1899), speaks of a revocation only on the ground of fraud in the procuring of a composition. Unless any fraud which would have prevented the granting of a discharge is *per se* a fraud in procuring a discharge, this narrow interpretation is not consistent with the Act of 1898; and if these distinctions in kind of fraud are without a difference, the real governing principle is

the discovery subsequent to the discharge made by parties in interest "that the actual facts did not warrant the discharge," provided that application for a revocation is made within one year after the discharge.

**BANKRUPTCY—PREFERRED CREDITOR'S SET-OFF.**—That a creditor who receives a payment, though innocently, after the debtor is in fact insolvent is a preferred creditor seems the prevalent construction of Sections 57g, 60a, b, 1 COLUMBIA LAW REVIEW, 53. But it is yet disputed whether such a creditor may avail himself of the set-off allowed by Section 60c. According to that Section a preferred creditor who has "in good faith" sold the debtor more goods on credit without security can set-off the amount of this sale "against the amount which would otherwise be recoverable from him." It has been said that the section applies only to a guilty preferred creditor described in Section 60b, because of the words "recoverable from him," for the reason that it is only a guilty preference which is by the act recoverable. *In re Christensen*, 4 Am. B. R., 202 (N. D. C. Iowa, 1900). Consequently, an innocent preferred creditor who offered to pay back the excess of the preference above the set-off was denied the privilege of Section 60c. In interpreting that section too much weight has been given to the word "recoverable," and too little to the words "in good faith." One who has received a preference knowing of his debtor's insolvency could hardly be said to make a sale later to this same insolvent debtor in good faith. There is not much likelihood that a creditor will contribute his goods to help pay debts to others; and yet, unless a guilty preferred creditor has this intention he would not be extending further credit in that good faith required by the act.

There is no good reason to believe that the word "preference" in Section 60c has a different meaning from the same word in Section 60a or Section 57g, and the words "recoverable from him," if read in the light of these several sections would refer to the return of any preference by any creditor as a condition *sine qua non* of his proving his claim. Accordingly, an innocent preferred creditor, the only one who can answer to the description as to giving the insolvent further credit in good faith, should be allowed to prove his claim on paying the excess of his preference over the amount of unsecured credit given after receipt of the preference. So it has been held by GROSSCUP, J., in *McKey v. Lee*, 5 Am. B. R. 267 (C. C. A. Ill., 1901). The few cases in which section 60c has been construed take it for granted that it applies to guilty preferred creditors; but in this view the fundamental purpose of the act seems to have been overlooked. The guilty preferred creditor cannot say that he has extended further credit on the faith of the payment of his previous claims, because he knew of his debtor's insolvency, and the use of words seeming on first blush pertinent to him is not of itself sufficient to controvert the general design of the Legislature to discourage any fraud on creditors.

Accordingly, it is submitted that both *In re Christensen* and

*McKey v. Lee* misconstrue the intention of the act in admitting the application of Section 60c to guilty preferred creditors, but that the latter case correctly applies it to an innocent preferred creditor.

**FIRE INSURANCE.—WAIVER OF INCUMBRANCE PROVISION.**—The New York Court of Appeals, by a division of four to three, on February 5, 1901, rendered a decision of great interest and importance to the insurance world. *Skinner v. Norman, Jr.*, New York Law Journal, February 25, 1901. The plaintiff sent his agent to procure insurance on a steamboat. The agent of the insurance company asked if the boat was encumbered and was told he could learn by inquiry of the owner. This inquiry he agreed to make. The policy contained a provision making it void, unless all encumbrance should be noted therein. The boat was mortgaged, but no mention of the mortgage was made in the policy. *Held*, that the company had waived the warranty against incumbrance.

It is perhaps significant that the Court puts its decision upon two grounds, which do not strengthen each other, but involve totally different principles. One is notice to the company of the encumbrance, the other is the authority of the agent to undertake to search the title of the insured. It is settled law in New York, and most jurisdictions generally, that actual knowledge of the agent of ground for forfeiture is constructive notice to the company, and that the company waives the warranty against encumbrance by issuing a policy if, at the time the application was made, the agent knew the policy could be avoided.

*Van Schaick v. Niagara Falls Ins. Co.* 68 N. Y. 434 (1877); *Gray v. Germania Fire Ins. Co.* 155 N. Y. 180 (1898); *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304 (1889); *Mahoney v. Natl. & Life Ass'n, L. R.*, 6 C. P. 252 (1871); *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494 (1880). If, then, the agent of the company had actually known of the mortgage on the boat, the plaintiff's right to recover on the policy would be clear. But such is not the fact. The agent did not know, he merely said he would find out. Nevertheless the Court extended the doctrine of constructive notice to the company to this case, relying upon the analogy between the waiver of an unknown breach of warranty and a general release. This seems to lose sight of the real difficulty. Had the insured dealt directly with the company, instead of an agent, the analogy would be more complete. Furthermore, a general release raises no question of admitting parol evidence to vary the written instrument. The two essentials to constitute a waiver of a condition broken at the time the policy is issued have been supposed to be actual knowledge of the agent and delivering the policy by the company. Hereafter in New York actual knowledge of the agent is unnecessary if he might have known, or has volunteered to find out. Constructive notice to the agent of material facts is made constructive notice to the insurance company. Since the rule as formerly applied was anomalous, the sound-

ness of extending it further seems open to doubt. *Batchelder v. Queens Ins. Co.* 135 Mass. 449 (1883); *Deweese v. Manhattan Ins. Co.* 6 Vroom (N. J.), 366 (1872).

The second ground upon which the decision is based is that the agent of the company had authority to search title. The Court neither cites authority for this proposition, nor supports it by argument. It is simply assumed. Here, again, the act of agent should have been sharply distinguished from the same act of the company. The company could have undertaken to search the title of the insured, but it does not follow that the soliciting agent had authority to undertake the search in behalf of the company. If the agent was not authorized to investigate the condition of the title of insured, his volunteering to do it in no wise affects the company. No ratification is claimed. No case has been found in which this question has been passed upon.

The authority of the agent has been much discussed where he delivers the policy without collecting the first premium. It has been held that he can determine how and when this premium shall be paid when he closed the contract. *Bodine v. Exchange Fire Ins. Co.* 51 N. Y., 117 (1872). But this does not warrant the conclusion that a soliciting agent has, from the nature of his duties, implied authority to search the title of applicant for insurance. The absence of decisions on this point indicates that it is not customary for agents to undertake a task so far removed from the line of their ordinary duties.

## RECENT DECISIONS

**BANKRUPTCY—PREFERRED CREDITOR'S SETOFF.** A creditor who received a preference under Section 60a, but without knowledge or reason to believe that it was a preference, and who later sold the bankrupt goods without security, is *held* under Section 60c. entitled to set-off the amount of this subsequent sale from the preference received, and, on payment of the excess of the preference, to prove his claim. *McKey v. Lee*, 5 Am. B. R. 267 (C. C. A. Ill. 1901). SEE NOTES.

**BANKRUPTCY—REVOCATION OF DISCHARGE.** A petition alleging fraud committed several years prior to the adjudication, when there is no proof that the discharge was obtained through fraud, or that the knowledge has come to the petitioners since the granting of the discharge, *held*, insufficient to revoke a discharge according to Section 15. *In re Hoover*, 5 Am. B. R. 247 (D. C. East. Dist. Pa. 1900). SEE NOTES.

**BILLS AND NOTES—GUARANTY ATTACHED—NEGOTIABILITY.** The payee of a promissory note endorsed in blank without recourse, and in addition attached a guaranty of payment within a specified time after maturity, and fixed certain conditions in case of maker's default. *Held*, that the guaranty rendered the note non-negotiable. *Doe v. Callow*, 63 Pac. 603 (Kas., Jan. 1901).

This decision can be supported neither on principle nor by virtue of any peculiar doctrine of the jurisdiction. The cases relied on by the Court are not authority for the position taken. In *Lyon v. Martin*, 31 Kas. 413 (1884) cited, the only point bearing directly on the law of bills and notes is a holding that a waiver of all relief from valuation, appraisement, stay or exemption does not destroy the negotiability of the instrument. In *Briggs v. Latham*, 36 Kas. 209 (1887), the action was brought by a holder subsequent to the contract of guaranty against a guarantor who neither executed the instrument, was ever liable upon it, nor received any consideration. *Killam v. Shoeps*, 26 Kas. 310 (1881), was a holding in accordance with settled law, that an instrument so involved with other matters as to lose its character as a commercial instrument was not negotiable. In the principal case the guarantee was by a regular endorser on the paper, had no effect until after maturity, and could operate in no way as a drag on the negotiability of the instrument.

**BILLS AND NOTES—INTEREST—INABILITY TO MAKE DEMAND.** By a statute of Colo. (Laws of 1889, p. 206, Jan. 2) interest is recoverable on money due on account from maturity. The defendant bank had temporarily suspended payment. On the day it resumed, plaintiff demanded his deposit and was paid, but claimed, in addition, interest during the time of suspension on the ground that such a fact made a demand unnecessary to fix the defendant's liability. The Court refused to allow interest before a demand. *Patten v. American National Bank of Denver*, 63 Pac. 424 (Colo., Jan., 1901).

In Colorado, wherever there is no agreement as to interest, it is restricted to statutory instances and the statute receives a strict interpretation. *Denver S. P. & P. R. Co. v. Conway*, 8 Colo. 16 (1884). Aside from these conditions even, the principal case represents a sound view, and the one taken in at least one other case, *Sickles v. Herold*, 43 N. E. 852 (N. Y., 1896). The undertaking of the bank is to repay only upon demand, and here there was no intention shown to bring the debt to maturity prior to the time the deposit was paid. The insolvency of a bank is not to be inferred from the appointment of a temporary receiver, and, therefore, this case is to be distinguished from that of insolvency where a demand is unnecessary. On any other theory the

bank would be liable to pay interest on all deposits, irrespective of whether or not the creditors of the bank would have elected to demand, and so bring their accounts to maturity.

CONSTITUTIONAL LAW—CONTROVERSIES BETWEEN THE STATES—JURISDICTION OF UNITED STATES SUPREME COURT. Original bill by the State of Missouri against the State of Illinois and the Sanitary District of Chicago, a public corporation organized under the laws of the State of Illinois, to prevent the discharge of sewage into the Mississippi River through the Chicago drainage canal. *Held*, on demurrer, that the United States Supreme Court had jurisdiction over the defendant State as well as over the defendant corporation, citizen of that State. *State of Missouri v. State of Illinois*, 21 Sup. Ct. Rep. 331 (Jan. 28, 1901).

This case decides squarely that under Article III, Section 2, U. S. Const. whenever one State may choose to make complaint before the Supreme Court of the United States against another State for any act of the defendant State done by its legislature, officers or other agents, the defendant State cannot demur to the jurisdiction of the Court. The complainant State is the sole judge of whether it should feel aggrieved or not. It makes no difference whether the supposed injury concerns the extent of the sovereign jurisdiction of the complainant, as in boundary dispute cases [cf. *Rhode Island v. Massachusetts*, 12 Peters, 657 (1832)]; or whether, as in the present case, the injury affects mere property rights of the complainant State or its citizens. The question arises as to what decree the Court will eventually make in this case if it should decide in favor of the complainant. It could hardly compel the Illinois Legislature to legislate on the matter. But this does not seem a valid objection against taking jurisdiction over the State of Illinois. For any decree prohibiting the discharge of sewage into the Mississippi River will be more effective if directed against the "State of Illinois and all or any of its agents" than if directed only against the single co-defendant in this case, the Sanitary District of Chicago.

CONTRACTS—CONSIDERATION VOID IN PART. In consideration that plaintiff promised to care for defendants' testator till his death, and to refrain from marriage, testator agreed to provide amply for her in his will. The promise not to marry was void as against public policy. *Held*, that where the consideration for a promise is two-fold, part of which is void, the other part, if good, will support that promise. And that where the void promise is incidental to the main engagement, which has been performed, an action will lie for such performance by the other party. *King v. King*, 59 N. E. 111 (Ohio, Nov., 1900).

It is well settled that where a promise is based upon two considerations, one of which is void for insufficiency, if the other be good the promise will be enforced. *King v. Sears*, 2 Crompt. M. & R. 48 (Exchequer, 1835). *Chitty on Contracts*, 9th Edition 56. But it is equally well settled, that where the contract is entire, and part of the consideration is illegal, the whole contract is bad. *Derg v. Chapman*, 9 Shep. 488 (Me. 1843). *Filsoms v. Hines*, 5 Barr. 452 (Pa. 1846). *Loomis v. Newhall*, 15 Pick. 159, (Mass., 1833). The principal case would seem to be of this nature. *Metcalf on Contracts*, Boston, 1867, p. 221. *Chitty on Contracts*, and cases cited above. Certainly there is no authority in the court to say what part of the contract is important, and what immaterial. This would be making an agreement for the parties, not enforcing one they have made. 2 *Parsons on Contracts*, 5th Edition, 505.

CONTRACTS—OFFEREE'S KNOWLEDGE OF OFFER. One who takes a folded paper from an express agent, containing a special contract limiting the company's liability, is not bound thereby, unless he knew it to be such, or actually had knowledge of its contents. *Springer v. Westcott*, *New York Law Journal*, March 14, 1901.

The decision follows the long line of authorities in this State on the same point, and decides the question of fact in a similar way. *Blossom v. Dodd*, 43 N. Y. 264 (1870); *Madan v. Sherrard*, 73 N. Y. 329 (1878);

*Grossman v. Dodd*, 63 Hun. 324 (1892). In cases of bills of lading, the same Court has decided that the shipper is affected with notice of the stipulations contained therein, whether he has read the paper or not. *Hill v. R. R. Co.*, 73 N. Y. 351 (1878); *Zimmer v. R. R. Co.*, 137 N. Y. 460 (1893). And so in passenger tickets for transportation on ocean steamships. *Steers v. Steamship Co.*, 57 N. Y. 1 (1874); *Fonseca v. Steamship Co.*, 153 Mass. 553 (1891) *accord*. The reason given is that those transactions are of such common occurrence, and steamship tickets and bills of lading are so universally known to contain conditions and stipulations, that the one receiving such instruments is considered to have assented to their terms, irrespective of his actual knowledge thereof. In these days, certainly, contracts for baggage carriage by express companies are as frequently engaged in as contracts for freight, and ocean transportation, and it might be reasonable, perhaps, to say that the principle of the latter cases is equally applicable to the former. *Watkins v. Rymill*, 10 Q. B. Div. 178 (1883).

**CORPORATIONS—STATUTORY LIABILITY OF DIRECTORS NOT PENAL.** Defendant, director of corporation organized in So. Dakota, by statute of incorporation, was there individually liable for all debts contracted in excess of capital stock. *Held*, such liability is contractual, not penal, and could be enforced in any State. *Farr v. Briggs*, 47 Atl. 793 (Sup. Ct. of Vt., April 13, 1900).

This case is against the great weight of decisions, but in accord with views of text writers. It is well settled penal statutes are not enforceable except in State where enacted. Story, *Conf. Laws*, §§ 620, 621. But urged that statutory liability of directors is usually not penal in criminal law sense, but a private obligation, similar to that of sureties, and imposed for the double purpose of inducing directors to do their duty and of securing creditors from loss. *Morawetz, Corporations*, §§ 907-8; *Cook, idem*, § 323; *Thompson, idem*, §§ 3052, 4164-6, 8525-6. This would also seem to be the trend of recent decisions: *Huntington v. Attril*, 146 U. S. 657 (1892), distinguishing between statute to punish offense against public justice of State, and one to afford private remedy to person injured by wrongful act; *Same v. Same*, Privy Council (1893), App. Cases, 150, that liability to be penal must be in nature of suit in favor of State whose law is infringed. See also *Brady v. Daly*, 175 U. S. 148 (1899), at p. 155. *Contra: Stokes v. Stickney*, 96 N. Y. 323 (1884); *Carr v. Rischer*, 119 N. Y. 117 (1890). And cf. *Marshall v. Sherman*, 148 N. Y., 9 (1895).

**DOMESTIC RELATIONS—CONTRACT OF MARRIED WOMAN—VALIDITY OF JUDGMENT.** Husband and wife made a joint note under the common law. Later the Weissinger Act was passed authorizing a married woman to sue and be sued as a *feme sole*. Suit was then brought on the note and judgment against the wife obtained and now held valid. *Howard v. Gilson*, 60 S. W. 491 (Ky., Jan. 1901).

This Court relies solely on the authority of *Turner v. Gill*, 49 S. W. 311 (Ky., 1899), but misinterprets the doctrine of that case. The question there was one of pleading, not whether the note was a valid obligation. The Court says, referring to the status of the wife, after the passage of the Act in question: "She stands before the law \* \* \* just as a divorced woman or a widow would have stood prior to the passage of the Statute referred to, if sued upon an obligation made during her coverture." The Court does not mean that a note invalid because of coverture is valid when the woman becomes sole. They say judgment could not be taken against a married woman, because it is but a contract of record and would not be binding upon her; the Act removes that objection. The defendant must plead her coverture specially; this she deliberately refused to do when she had her day in Court, and the judgment shall stand. Nevertheless it is established that the note of a married woman at common law was not merely suspended during coverture, not voidable and subject to ratification, but absolutely void. *Waul v. Kirkman*, 25 Miss. 609 (1853); *Parkman v. Tennyson*, 50 Ind. 456



(1875). In the principal case the note was void and the plaintiff stated no cause of action upon which a judgment could issue.

**DOMESTIC RELATIONS—FRAUDULENT DIVORCE—ANNULMENT.** Defendant, after a divorce secured by fraud, married a second husband. After his death she claims an interest in the estate, whereupon his heirs make application to have the decree of divorce set aside. *Held*, that plaintiffs have not sufficient interest to maintain their suit. *Tyler v. Aspinwall*, 47 Atl. 455 (Conn., Jan. 1901).

Upon proof of fraud in the procurement of a judgment the party defrauded may have it vacated at any time. *Cannan v. Reynolds*, 5 El. & B. 301 (1855). And relief will not be refused to the injured party, because of a subsequent marriage contracted by the other party on faith of the decree of divorce. *Allen v. McClellan*, 12 Penn. St. 328 (1849). But the general rule is that no one not a party to a judgment can make direct application to have it annulled. *Baugh v. Baugh*, 37 Mich. 59 (1877). And where a departure has been made from this doctrine, it has been in favor of petitioners who have been prejudiced as to well-defined legal rights by the judgment in question. This question of practice is now commonly governed by statute.

**EQUITY—SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF PERSONALTY—ADEQUACY OF LEGAL REMEDY.** *Held*, That in a contract for the sale of certain live stock, the fact that the company who engaged to deliver said live stock had no other property in the State, and so was practically insolvent was ground *per se* for granting specific performance, as the insolvency made the legal remedy inadequate. *McNamara v. Home Land & Cattle Co.*, 105 Fed. 202 (Dec. 10, 1900).

This novel decision confuses adequacy of remedy at law with adequacy of the defendant's estate, and reaches a result which is supported by a few *dicta* merely. As Mr. Pomeroy says in Note 2, p. 34 of the Second Edition of his *Specific Performance*, after criticising a dictum of SIR JOHN LEACH's in *Doloret v. Rothschild*, 1 S. & S. 590 (1824). "In a few early American cases, also, the insolvency of the defendant is stated as a partial reason or at least as a makeweight for granting the relief." There are a number of cases containing *dicta* to the same effect as the principal case, but most of them are to be explained as cases of enforcement of a trust of personal property. Of this nature are both the cases cited by the learned Judge, and the additional case cited for his view in the American and English Encyclopædia of Law, Vol. 22, page 992. *Clark v. Flint*, 22 Pickering, 231 (*Mass.*, 1839); *Parker v. Garrison*, 61 Ill. 250 (1871), and *Johnson v. Brooks*, 93 N. Y. 337 (1883).

**FEDERAL PRACTICE—REMOVAL OF CAUSES.** By an Indiana statute every railroad in the State is liable to an employee for all injuries caused by the negligence of a fellow-servant. In a joint suit by an injured employee against his fellow-servant and a non-resident corporation, *Held*, the cause of action was not separable and could not be removed to a Federal court. *Charman v. Ry. Co.*, 105 Fed. 449 (Ind. 1900).

The Federal courts have ruled that master and servant cannot be sued jointly for negligence of the servant where the master is not personally concerned in the negligence. *Warax v. Ry. Co.*, 72 Fed. 637 (1896). On this point of substantive law the principal case is not in conflict with the latter decision, since by another statute in Indiana master and servant may be sued jointly and the Federal court would necessarily follow the State ruling. *Connell v. Ry. Co.*, 13 Fed. Rep. 241 (1882). The Supreme Court has repeatedly affirmed that when a plaintiff has sued defendants jointly at law the case cannot be removed by a defendant whose citizenship is different from that of plaintiff, even though the alleged cause of action be joint and several. *The Removal Cases*, 100 U. S. 457 (1879); *Ayres v. Wiswall*, 112 U. S. 187 (1884); *Ry. Co. v. Martin*, 178 U. S. 245 (1900). The principal case seems to be correctly decided.

**FEDERAL PRACTICE—RULES OF DECISION.** Where by a decision of the highest court of a State the legal status of property has been determined

according to the laws of that State, *Held*, that decision cannot be collaterally assailed in a Federal court, the latter being bound by the decisions of the State courts. *State Trust Co. v. Machine Co.*, 105 Fed. 468 (C. C. A. 1900).

The case involves an application of the rule that a Federal court in interpreting State statutes as to property will always follow the decisions of the highest court of that State, and in that respect the decision is correct. *Holland v. Challen*, 110 U. S. 15 (1883); *Reynolds v. Crawfordsville Bank*, 112 U. S. 405 (1884). The statement in the head note of the principal case to the effect that where the legal status of the parties has been determined, the decision is not open to review, and the judgment binding on all parties is misleading, for the Court did not decide that point. Such a decision would violate the rule that judgments bind only the parties to the suit.

**FIRE INSURANCE—WAIVER OF INCUMBRANCE PROVISION.**—Insured, when asked by the agent of the company if there was any incumbrance on the boat, answered that he did not know. The agent volunteered to see the owner of the boat. The policy contained a provision rendering it void if the boat were encumbered and the incumbrance not noted in the policy. The boat was mortgaged and no reference to the mortgage was made in the policy. *Held* that the insurance company by its conduct had waived the warranty against incumbrance, and that plaintiff could recover. PARKER, C. J., GRAY and O'BRIEN, J. J., dissenting. *Skinner v. Norman as Tr.*, New York Law Journal, Febr. 25, 1901 (N. Y. Ct. of Appeals, Febr. 5, 1901). SEE NOTES.

**INSURANCE—ONE YEAR TERM POLICY.** A Vermont statute directs that foreign insurance companies shall be licensed only when they have proved that they possess assets equal in amount to their outstanding liabilities, "reckoning the premium reserve on life risks, based on the actuaries' tables of mortality as a liability." *Held*, a company may write and consider its first year insurance as term insurance, requiring no premium reserve. *Bankers' Life Insurance Company v. Insurance Commissioners*, decided in Vermont Jan. 30, 1901. SEE NOTES.

**PARTY WALLS.—COVENANTS RUNNING WITH THE LAND—IMPLIED PROMISE.**—Plaintiff, owner of two adjoining lots, built on lot X and conveyed to A. Lot Y he conveyed unimproved to B, by deed which provided that grantee, in accepting it, agreed for himself, his heirs and assigns, to pay plaintiff for so much of party wall standing on land conveyed as he or they might use. Defendant acquired both lots and used party wall. *Held*, B's covenant was personal, and plaintiff cannot recover. *Lincoln v. Burrage*, 59 N. E. 67 (Mass., Jan. 3, 1901). SEE NOTES.

**PLEADING—COUNTERCLAIM—USURY—RECOVERY OF PENALTY.**—Defendant as maker of promissory note, in suit thereon by individual banker, counterclaimed under *Code Civ. Pro.*, §§ 501, 502, for the penalty, of twice amount of usurious interest paid, imposed by General Banking Law of N. Y. (Laws 1892, c. 689, § 55). *Held*, legislative intent was to place individual bankers and national banks on a complete equality. Hence penalty could only be enforced as provided by act of Congress, approved June 3, 1864 (13 Stat. 99, Sect. 30). *Barnet v. Bank*, 98 U. S. 555 (1878), having so held in the case of national banks. *Caponigri v. Altieri*, 59 N. E. 87 (Ct. of Appls., N. Y., Jan. 8, 1901).

*Lewis v. Bank*, 75 N. Y. 516 (1878), allowed such counterclaim as matter of procedure under Code. But on reargument, after decision in *Barnet v. Bank*, *supra*, *held* practice of a State in regard to set-offs or counterclaims cannot defeat object of Federal statute. 81 N. Y. 15 (1880). Where statute provides for a forfeiture, to be recovered by an action, the remedy thus given is exclusive and must be pursued. This case reaffirms and extends by analogy the doctrine so laid down.

**PLEADING—HUSBAND AND WIFE—WIFE'S AGENCY TO CONTRACT FOR NECESSARIES.** Declaration for goods sold and delivered to defendant at request

of his wife as agent. At trial it appeared defendant and wife had been separated eight years. *Held*, evidence admissible to show articles furnished wife were necessities, as it did not tend to prove another cause of action. *BARTLETT, VANN and GRAY, J.J.*, dissenting. *Hatch v. Leonard*, 59 N. E. 270 (N. Y., Feb. 1, 1901).

Where husband and wife have separated there is no longer necessarily a true agency, but as in case at bar, a more extensive "authority of necessity" or "agency implied in law." Schouler, *Domestic Relations*, §§ 61n, 64, 70; *Husband and Wife*, §§ 120, 123. A husband has been held liable for necessities furnished against his express orders. *Cromwell v. Benjamin*, 41 Barb. 558 (1863). For reasonable legal expenses of wife in defence of prosecution instituted by himself. *Warner v. Heides*, 28 Wis. 517 (1871). And even in a just cause where he himself was person prosecuted. *Shepherd v. Mackoul*, 3 Camp. 326 (1808); *Morris v. Palmer*, 39 N. H. 123 (1859). Hence the authorities seem to justify minority opinion that under general allegation of agency only actual authority should be proved, whether express or implied in fact. Complaint should have stated facts from which authority could be implied.

**POLICE POWER—LICENSES FOR BICYCLES.** Requiring a license fee for riding bicycles on the streets is not an exercise of the police power of a municipal corporation. *People v. Bruce*, 63 Pac. 519 (Wash., 1901).

This case represents the generally accepted view that a bicycle being a reasonable means of locomotion and streets being public highways, the police power extends only to regulating the use of bicycles. *Thompson v. Dodge*, 58 Minn. 555 (1894); *Densmore v. City of Erie*, 20 Penn. Co. Ct. Rep. 513 (1898). A question about which there is no little confusion arises when it becomes necessary to decide what is a fee and what a tax. In a recent case where in order to support a legislative act it was necessary to refer a certain charge on bicycles to the police power, it was *held*, if the imposition is laid primarily for regulation it is referable to the police power, otherwise to the taxing power. *Ellis v. Frasier*, 63 Pac. 642 (Oregon, 1901).

This principle, misleading from a fiscal standpoint, has been generally accepted. The conflict in decisions arises when this test is applied. Often courts, owing to constitutional limitations or statutory restrictions, being unable to support a charge as a tax will refer it to the police power, where other courts, not so restricted refer the same charge to the taxing power. See *Mayor, etc., v. 2d Ave. Ry. Co.*, 32 N. Y. 261 (1865), and *Frankford Ry. Co. v. Phila.*, 58 Penn. 119 (1868).

**PROPERTY—CHATTEL MORTGAGES—AVOIDANCE.** *Held*, that the statutory right to set aside unrecorded chattel mortgages as void against creditors does not pass to the mortgagor's assignee for the benefit of his creditors to the exclusion of subsequent execution creditors. *Wimpfheimer v. Perrine*, 47 Atl. 769 (N. J. Eq., Dec. 1900).

This case follows closely the decision in *Shaw v. Glen*, 37 N. J. Eq. 32 (1883). In the same State it is held that the right to avoid conveyances fraudulent as to creditors passes to the assignee. *Pillsbury v. Kingon*, 33 N. J. Eq. 287 (1880). While there is a sharp conflict of authority as to these questions, the prevailing view seems to be that the assignee takes the debtor's property subject to all prior equitable liens. Many of the cases turn on the construction of particular statutes.

**REAL PROPERTY—EASEMENTS—WAY OF NECESSITY.** A railway had condemned a strip of land through the defendant's farm, *held* as a matter of law that the defendant had no right to a way across this strip from one to the other part of his farm. *A. T. & S. F. Ry. Co. v. Conlon*, 63 Pac. 432 (Kas., Jan. 1901).

There is a presumption of law that the parties understand that he who sells a portion of his land shall have a right of access to the remainder over the part sold, where such a right is indispensable to the beneficial enjoyment of the estate. *London v. Riggs*, 13 Ch. D. 798 (Eng., 1880); *Benedict v. Barling*, 79 Wis. 551 (1891); *N. Y. & N. E. Ry. Co. v.*

*Board of R. R. Comm'rs*, 162 Mass. 81 (1894). Massachusetts has a peculiar doctrine that where land is taken by a railway under the right of eminent domain no such presumption can arise. This is solely by virtue of Gen. Stat. C. 3 Par. 7, in which "land" is defined to include "easements." The condemnation, therefore, is construed to leave outstanding no such right of necessity. *Googin v. Boston & Albany*, 155 Mass. 505 (1892). Except under some such statutory provision a way of necessity is to be recognized. The principal case should have followed *Kansas Central R. R. Co. v. Allen*, 22 Kas. 285 (1879). Construing Art. 9, Ch. 23, Gen. Stat. to permit the retention of the fee by the original proprietor of the land and his right for every purpose not incompatible with the rights of the railway. The company then had a right to fence up their road, if they required exclusive occupancy of the land, but whether they did require such exclusive occupancy was a question of fact and should not have been laid down as law.

**REAL PROPERTY—ERRONEOUS SURVEY—ADVERSE POSSESSION.** Adjoining land owners had a survey made of their dividing line, and they and their grantees acquiesced in the survey and occupied up to the line so run. It was subsequently found to be erroneous, and plaintiff sought to recover the strip belonging to him by a re-survey. Held, defendant having occupied the land in question as owner for the statutory period, acquired the title thereto by adverse possession [*Winn v. Abeles*, 35 Kan. 85 (1886), distinguished.] *Zimmerman v. Ginter*, 63 Pac. 657, Kansas, Jan. 1, (1901).

While other jurisdictions, in which the doctrine that adverse possession cannot be founded on mistake prevails, have drawn a similar distinction, *Heath v. Kirkpatrick*, 48 Iowa, 78 (1878), distinguishing *Grube v. Wells*, 34 Iowa, 148 (1871), the distinction here attempted—that in one case a survey was made, and none in the other—seems upon principle untenable. For in each the occupation followed from a mistake, in each the defendant occupied the land as his own, and clearly there was as much intention to possess to the exclusion of the true owner in the one, as in the other. While there is authority for the doctrine of *Winn v. Abeles*, the better opinion is that one taking possession of another's land and occupying it as his own so as to assert in fact a title against the true owner, is deemed to be in adverse possession, regardless of whether or no this entry was made through mistake. (*French v. Pearce*, 8 Conn. 439 (1831); *Alexander v. Wheeler*, 69 Ala. 332 (1881); *Eldridge v. Kenning*, 35 N. Y. S. R. 190 (1891). And see *Ramsey v. Glenney*, 45 Minn. 401 (1891), and *Wilson v. Hunter*, 59 Ark. 626 (1894), for holdings squarely opposed to *Winn v. Abeles*. However this may be, the authorities are almost at one upon the actual decision of the principal case. *Boyd v. Graves*, 4 Wheaton, 513 (1819); *Bauer v. Gottmanhausen*, 65 Ill. 499 (1872); *Main v. Killinger*, 90 Ind. 165 (1883); *Hoffman v. White*, 90 Ala. 354 (1890); *R'y Co. v. Quain*, 94 Ky. 310 (1893); *Pearson v. Dryden*, 28 Or. 350 (1896). Contra, *Knowlton v. Smith*, 36 Mo. 507 (1865).

**REAL PROPERTY—MORTGAGES—STATUTE OF LIMITATIONS—ADVERSE USE.** Held, the statute runs against a mortgagee in favor of one who bought part of the mortgaged premises from the mortgagor without notice of the mortgage, though the interest on the mortgage has been regularly paid by the owner of the other part. *Mack v. Anderson*, 59 N. E. 289 (N. Y. Feb. 5, 1901); *Ely v. Wilson et al.*, 47 Atl. 806 (N. J. Ch. Dec. 27, 1900).

It is generally held that the mortgagee's full claim is kept alive by payments on the mortgage though made by the owner of only part of the property. *Chinnery v. Evans*, 11 H. L. Ca. 115, 132, 138, 139 (1864); *Pike v. Goodnow*, 12 Allen, 472 (Mass., 1866); and see *Jager v. Vollinger*, 174 Mass. 521, 524 (1899); *Barrett v. Prentiss*, 57 Vt. 297 (1884); *Cross v. Allen*, 141 U. S. 528 (1891); 2 JONES, *Mort.*, § 1198; *Longstreet v. Brown*, 37 Atl. 56 (N. J. Ch. 1897). Some color of authority for the present decision is found, however, in a dictum from *Depew v. Colton*, 46 Atl. 728 (N. J. Err. & App., 1900), and there is, perhaps, force in the suggestion that it imposes no greater hardship upon the mortgagee

than rests upon every owner out of possession. The very carefully considered decision in *Murdock v. Waterman*, 145 N. Y. 55 (1895), amply justifies the present holding in New York. *Boughton v. Van Valkenburgh*, 61 N. Y. Supp. 574 (1899).

**REAL PROPERTY—RIPARIAN RIGHTS—ALLUVIUM.** Defendant, in strengthening an embankment, so altered the course of a navigable stream as to stop an accustomed deposit of sand upon a strip of shore along which the plaintiff's farm abutted. The strip whereon the deposit had formerly been made was covered by the ordinary high tides. This action was for damage caused plaintiff by depriving, both in the past and for the future, of alluvium, which, but for defendant's embankment, would have been deposited on the above strip of shore. *Held*, he might recover. *Freeland v. Pennsylvania Ry. Co.*, 45 Atl. 735 (Pa., Jan. 1901).

At common law a grant of land bounded by a navigable stream ended at high water mark, and the plaintiff would have had no title to the strip of shore in question. 3 *Kent. Com.* 12th ed. 427. *Middleton v. Pritchard*, 3 Seaman 510 (Ill. 1842). *U. S. v. Pacheco*, 2 Wall. 587 (U. S. 1864). But in Pennsylvania the riparian owner has the fee of the soil to ordinary low water mark, subject to public rights of fishing, etc. 3 *Kent Com.* 427. *Lehigh Valley Ry. Co. v. Trone*, 28 Pa. St. 206 (1857). If the fee of the shore was in the plaintiff, the alluvium added by stream was his too, and his right to future alluvium was a vested right, for any disturbance of which the defendant would be liable. *St. Clair Co. v. Lovingson*, 23 Wall. 46 (U. S., 1874). *Municipality No. 2 v. Orleans Cotton Press*, 18 La. Rep. 122 at p. 213 (1841). *Chapman v. Hoskins*, 2 Md. Ch. 485 (1851). Further, the plaintiff, being a riparian owner, had a right that the course of the stream should not be varied to his damage by a superior owner. *Embrey v. Owen*, 4 Eng. Law & Eq. Rep. 466 (1851). *Gerrish v. Clough*, 48 N. H. 9 (1868).

**REPLEVIN—WHEN THE ACTION WILL LIE.** Sale of goods from plaintiff to defendant induced by latter's fraud. Before any rescission by plaintiff, goods seized on lawful execution, which defendant could not resist. *Held*, plaintiff cannot then maintain replevin. *Sinnot v. Feacock*, 59 N. E. 265 (Ct. of App., N. Y., Feb. 1, 1901).

At common law replevin lay, by any one with immediate right to possession, for specific goods unlawfully taken and detained and in possession of defendant. *Panghorn v. Patridge* 7 Johns. 140 (1810); *Morris on Replevin*, Ch. II. But scope of remedy has been greatly extended by statute. In N. Y. by 2 R. S., 522, §§ 11, 19; and *Code of Procedure* of 1848, Title 7, Pt. 2. C. 2, Secs. 206, 207, it was made co-extensive with detinue, thereby abolished. Two English cases, *Garth v. Howard*, 5 C. & P. 346 (1832), *Jones v. Dowle*, 9 M. & W. 19 (1841). PARKE, B., held defendant liable in detinue where once he had had possession but wrongfully pledged before action brought. *Nichols v. Michael*, 23 N. Y. 264 (1861), applied doctrine to replevin. Reaffirmed under *Code Civ. Pro.*, Sects. 1689-1730—that where defendant has voluntarily parted with possession or control replevin will lie even though property be beyond reach of Court. *Barrett v. Selling*, 70 N. Y. 482 (1877). Plaintiff in main case urged intent of revisers (R. S., Title 12, Pt. 3, c. 8) to make replevin "concurrent" with trover, but court refused to extend decisions to case where property destroyed without defendant's fault or seized on lawful process. *Brumley v. Lambert*, 1 Wash. (Va.) 308 (1793); *Pool v. Adkisson*, 1 Dana (Ky.) 110 (1833); *Caldwell v. Fenwick*, 2 Dana 333 (1834), *accord*. Other jurisdictions are more conservative. *Gildas v. Crosby*, 61 Mich. 113 (1886), under statute similar to N. Y., held defendant must have parted with possession with intent to avoid writ. Wis., *Semble, accord*. In Mass. defendant must be in possession when action brought. *Hall v. White*, 106 Mass. 599 (1871). N. H., Iowa, Mo., Me., Minn., N. C., *accord* Ky. and Va. (*supra*) hold like N. Y.

**SURETYSHIP—SUBROGATION OF CREDITOR TO SECURITIES HELD BY SURETY.** Principal debtor mortgaged leaseholds as personal indemnity to mortgagee

for guaranteeing former's note. Mortgagee agreed to satisfy mortgage, but then asserted inability to perform, before payment of note, without assent of holder. *Held*, as both principal and surety were solvent, creditor had no interest in mortgage, and mortgagee must perform. *Fertig v. Henne*, 47 Atl. 840 (Sup. Ct. of Pa., Jan. 7, 1901).

Interesting as adopting modern English rule, that securities given by creditor to surety for personal indemnity only, form part of general assets of surety. The prevailing American, like the early English, doctrine makes surety hold as trustee for creditor from moment securities are received. Brandt (*Suretyship*, 2d ed. §§ 324-328) accepts this theory unreservedly, without noticing discovery of later English cases that it rests on mere dictum of *Maure v. Harrison*, 1 Eq. cases, Abridg. 93 (1692), supposed to have been followed by LORD ELDON in *Ex Parte Waring*, 2 Glyn & Jameson 404 (1815), and since expressly overruled. *Royal Bank v. Commercial Bank*, L. R. 7 App. Cases 366 (H. of L., 1882); *Re Walker*, L. R. 1 Ch. (1892) 621. The number of exceptions found by American courts would tend to prove soundness of English rule. See Ames *Cases on Suretyship*, 620n, 641, 644n. In N. Y. and the Federal courts (*Semble*) the general American doctrine obtains. *Merchants' Bank v. Cummings*, 149 N. Y. 360 (1896); *Chamberlain v. St. Paul Co.*, 92 U. S. 299, 306 (1875). These cases of personal indemnity should be carefully distinguished from those of express trust for the benefit of creditors, the security being given as collateral for the debt proper.

**TORTS—DISCHARGE OF SERVANT CAUSED BY FALSE STATEMENTS OF THIRD PARTY—LIABILITY TO SERVANT.** The plaintiff was engaged as a servant, the employment being at will. Defendant, with malicious motives, made false statements concerning him, thereby causing his discharge. *Held*, he might recover against defendant, although the master did no wrong in discharging him. *Moran v. Damphey*, 59 N. E. 125 (Mass., Jan. 1901).

It is generally held that no action will lie for causing the discharge of another, where that is no contract liability on the part of the employer. *Allen v. Flood*, Ap. Cases, 1898, 1 (House of Lords). *Payne v. Ry. Co.*, 13 Lea 507 (Term 1884). *Heywood v. Fillson*, 75 Me. 225 (1883). To this doctrine the Massachusetts cases are an exception. *Walker v. Cronin*, 107 Mass. 554 (1871). The holding of the Court that though an act be in itself lawful, yet if it be done with malicious motives, it may become unlawful, does not express the general rule. *Allen v. Flood*, *supra*. *Phillips v. Nowlan*, 73 N. Y. 39 (1878). *Rideout v. Knox*, 148 Mass. 368 (1889). The latter case was decided by HOLMES, J., who also decided the principal case. The same judge, in 8 *Harv. Law Rev.* 1 (1894) makes a distinction between the malicious exercise of a right incident to the ownership of real property, and one not so.

Finally, it may be said, that through the disturbance of another's business, caused by means in themselves unlawful, such as intimidation [*Tarleton v. McGawley*, Peake 205 (K. B. 1790)], is an actionable wrong, yet to accomplish the same results by false statements is not generally so considered, unless the statements be in themselves defamatory. 8 East 1 (1807). *Cooley on Torts*, Chicago, 1888, p. 79.

**TORTS—MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTOR.** A municipality, acting under statutory authority, contracted for the digging of a public sewer in the street, reserving to itself the right to inspect the work and to discharge workmen. *Held*, it is not liable for consequential injuries to the plaintiff's house from the settling of the soil, due to the contractor's negligence, though this result had been foreseen by the city's engineers. *Uppington v. City of New York*, 165 N. Y. 222; 59 N. E. 91 (Jan. 8, 1901).

The propositions on which this case is vested are well established in New York by a line of cases culminating in *Atwater v. Trustees*, 124 N. Y. 602 (1891), on the one hand, and *Berg v. Parsons*, 156 N. Y. 109 (1898), on the other, though a better rule is that contended for by GRAY, J., dissenting in the latter case, that the employer is liable when the work con-

tracted for is inherently dangerous; and this properly covers cases where the resulting injury was anticipated by the employee. *Bonaparte v. Wiseman*, 42 Atl. 942 (Md., 1899). The reason is not altogether apparent for separating, in legal effect, the act itself from its foreseen consequences, unless the duty of the State to provide compensation for the taking of property is directly involved; nor does this necessarily result from *Benner v. Atlantic Dredging Co.*, 144 N. Y. 156 (1892). This holding does not of course at all lessen the city's responsibility for obstructions in the highway of which it has notice. *Schumacher v. New York*, *N. Y. Law Jour.* (March 9, 1901).

**TRUSTS—GIFT ATTEMPTED WITHOUT DELIVERY.** X with his own money bought stock certificates and made a bank deposit, both in his wife's name, but did not communicate the fact to her, and himself retained the certificates and pass books and received the dividends. After the wife's death the bank reissued the certificates in X's name and paid the deposit to him. *Held*, the wife's administrator cannot recover from the bank. *Getchell v. Biddeford Sav. Bank*, 47 Atl. 895 (Me., Dec. 18, 1900).

The want of delivery to or acceptance by the supposed donee is fatal. *Beaver v. Beaver*, 137 N. Y. 59, 67 (1893); *Sherman v. Bank*, 138 Mass. 541 (1885). The contrary ruling as to bank shares in *Standing v. Bourging*, 31 Ch. Div. 282 (1885), was based on the ground that control had, in fact, passed out of the donor (p. 290), and that and the similar case of *Read v. Roberts*, 85 Pa. 84 (1877), if they are to be supported, may be distinguished from the present on the ground that in them the intention, at least, to make a gift was shown. While notice to the *cestui que trust* is unnecessary: *Farleigh v. Cadman*, 159 N. Y. 169 (1899); *Robertson v. McCarty*, 54 App. Div. 103 (N. Y., 1900), no intention on the part of the husband to become trustee, as in those cases, existed here, and he could not be so regarded if "he had the stocks and money put in his wife's name thereby to become her property in case she should survive him." *Sullivan v. Sullivan*, 161 N. Y. 554 (1900). But, assuming that the husband might have been charged as trustee, no liability existed on the part of the bank after payment to him. *Thomassen v. Van Wyngaarden*, 65 Ia. 687 (1885).

**TRUSTS—LIFE TENANT vs. REMAINDERMAN—SINKING FUND TO OFFSET PREMIUM PAID FOR BONDS.** Devise to trustee "to collect and receive the rents, income in dividends, and profits, and apply same to use of A for life," with remainder over. Full power given trustee to invest in U. S. bonds. *Held*, trustee should have retained so much of interest during life of A as was necessary to offset premium paid for bonds, meet loss on their being paid off at maturity, and keep principal intact. O'BRIEN, J., dissenting. *N. Y. Life Ins. & Trust Co. v. Baker*, 59 N. E. 257 (Ct. of App., N. Y., Feb. 5, 1901).

The authorities agree any clear expression of intention in the will is controlling, but in absence of such expression decisions are conflicting and unsatisfactory. In England, no part of the annual income is to be set aside to indemnify the remainderman. 2 *Perry on Trusts*, § 547; *Lewin on Trusts*, 9th Eng. ed., 318-326. Mass. in general accords, though preferring to deal with each case as it arises rather than lay down a universal rule. *Hemenway v. Hemenway*, 134 Mass. 447 (1883); *Shaw v. Cordis*, 143 Mass. 443 (1887). But cf. *Trust Co. v. Eaton*, 140 Mass. 532 (1886), *semble contra*. In *McLouth v. Hunt*, 154 N. Y. 179 (1897), decision by O'BRIEN, J., in favor of life tenant, proceeded on intent as shown in will. But *Matter of Hoyt*, 160 N. Y. 607 (1899), appears squarely *contra* to the case at bar. Wording similar, yet *held* "clearly impossible, in giving language of will its plain meaning, to spell out intent to provide a sinking fund." PARKER, C. J., GRAY and HAIGHT, JJ., dissenting. In absence of contrary intention in will, on principle, loss should be borne by remaindermen, the increased security of investment being for his benefit. See *Hemenway v. Hemenway*, *supra*; and cf. *Hite v. Hite*, 93 Ky. 257 (1892), favoring life tenant.

## BOOK REVIEWS

THE PEACE CONFERENCE AT THE HAGUE. Its bearings on International Law and Policy. By F. W. Holls, D. C. L. New York: The Macmillan Co. 1900. pp. xxiv, 572.

In writing this account of the Peace Conference, at The Hague, Mr. Holls has endeavored to meet the demands of two classes of people, viz., the specialist in International Law and the general reader. The needs of these two, it need hardly be said, are in some respects divergent, if not actually antagonistic, the former desiring a fullness of detail not sought by the latter. The result, therefore, of an attempt to meet the requirements of both in one work must inevitably partake somewhat of the nature of a compromise. It may be said without hesitation that Mr. Holls has been eminently successful in reconciling the conflicting demands thus made upon him, with the result of producing a work which should find a place in the library of every student of international relations, whether specialist in International Law or not. Apparently the author was led to undertake the work, not merely because of the need for an accurate account of the Conference within the limits of a single volume of moderate size, but also in the hope of correcting the misunderstanding which still exists among the general public, both as to the purposes for which the Conference was called and as what it actually accomplished. As he points out, the title of "Disarmament Conference" generally applied in public print was based on a misinterpretation of the proposals of the Russian government, which, so far as they dealt with this subject at all, aimed at the most at putting an end to "the progressive increase of military and naval armaments," and not at all at any general disarmament. In view of this misapprehension of the objects of the Conference, the fact that it was found that the subject of disarmament could not even be discussed at the Conference, has undoubtedly left on the public mind an impression that the Conference was a failure. Whether or not we can agree with Mr. Holls in the high estimate which he makes of the value of the results attained, the Conference certainly was not in any sense a failure, but accomplished much which will undoubtedly be of lasting benefit to the civilized world.

The larger part of the volume is, of course, devoted to an account of the Conference. It gives accurately and without unnecessary detail the facts concerning the calling, opening and organization of the Conference, together with a full list of the members. Mr. Holls has wisely refrained from attempting any extended comment upon the provisions of the treaties agreed upon, confining himself to such remarks as seem necessary to elucidate the text or to show the motives which led to the adoption of any project. The



discussions of the various proposals in the committees, before they were laid before the Conference as a whole, are given with a fullness sufficient to indicate the reasons which led the delegates to adopt one plan or reject another. The same may be said of the report of the proceedings in the Conference itself. As the book has been written primarily for American and English readers, particular attention is properly paid to the action of the American and British representatives.

Probably the chapter which will most provoke discussion is the one in which Mr. Holls attempts to indicate the bearings of the Conference upon International Law and Policy. It is to be feared that most students of international affairs will not share the enthusiasm which leads the author to apply to the treaty of The Hague for the Pacific Adjustment of International Differences the title of "Magna Charta of International Law." Nevertheless, the chapter is not the least interesting in the book, and the question is one the decision of which must be left to the future.

The last two hundred pages of the volume are devoted to three appendices. The first of these contains the full text of the final act, treaties and declarations adopted by the Conference, the French text being printed on the left hand, and an English translation on the right-hand pages; the second gives the general report of the Commission of the United States made to the Secretary of State; and the third, an account of the Grotius celebration held at Delft July 4, 1898. The value of the book as a work of reference for the student of International Law would be enhanced were the index made somewhat more full. It is impossible, for example, to find by means of it what powers have ratified the different treaties. This, however, is but a slight blemish on a work which it is to be hoped will have a wide circulation and thus be the means of producing on the part of the world at large a more just estimate of the achievements of the Hague Conference.

**THE LAW OF TORTS.**—By Melville Madison Bigelow, Ph. D. Seventh Edition. Boston: Little, Brown & Co., 1901. pp. xxxi, 438.

This is an admirable book in every respect. In appearance, as well as in substance, the present edition is superior to either of the six editions which have preceded it. For this marked improvement both the publishers and the author are entitled to credit.

In the preface, Mr. Bigelow frankly admits that none of the earlier editions covered the whole field of tort; and he refers the reader, who cares to see the starting point of this work, to the preface of his leading cases on torts, published in 1875. A comparison of the two books is interesting and instructive. It shows not only that the author's conception of his subject has been enlarged and systematized during this quarter of a century, but also that the subject has received careful and scientific treatment by writers and judges. In his earliest book Mr. Bigelow dealt with various kinds of torts, and stated the rules appertaining to them with

clearness and accuracy, but he made no attempt to show that there was a law of torts. The first effective attempt of that sort was made by Sir Frederick Pollock a decade later. The present edition opens, however, with a full and lucid discussion of the principles underlying the English law of torts, and a statement of their application to the different classes of torts. Still, he does not essay the task of formulating a definition of tort which shall be complete in itself. Such a task, he declares, is hopeless. "Indeed no definition," to quote his language, "helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. But they all have this in common, that there must be a breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages." Dealing with the subject in this practical, English-lawyer-like way, he does not fall into the error of declaring that a tort is a violation of a right *in rem* only, or that one can always avoid committing a tort by forbearing to act.

Perhaps in no respect is the superiority of the present edition over its predecessors more marked than in its notes. Not only do they contain more references, but the citations are from a wider field than formerly, and are brought down to the latest possible date. This is notable, especially, in the chapters on Maliciously Procuring Refusal to Contract, and on Procuring Breach of Contract.

MAY ON INSURANCE. Fourth Edition. By John M. Gould. Boston: Little, Brown & Co. 1900. pp. Vol. I, xciv, 1-711. vol. II, 712-1510.

Extended criticism of a work first published in 1873 and now appearing in a fourth edition is obviously uncalled for. The only suggestion which we have to offer, with reference to the revision, ought to be equally obvious, though, unfortunately for student and practitioner alike, it seems not always to be apparent to the writers and publishers of legal text books.

It is far too often the case that author or reviser, as the case may be, regards his task as one of compilation only, and deems it complete when he has digested some thousands of decided cases and arranged his digests in more or less connected narrative form.

The comparison and analysis of decisions with reference to fundamental principles is hastily or imperfectly done, or, perhaps, what is preferable in such case, not done at all.

In dealing with a subject which is undergoing rapid development, the reviser, quite as much as the author, requires some ingredient other than citations and digests of decisions in order to compound a scientific treatise on the law. Of no branch of the law can this be said with greater truth than of the law of Insurance, and few books could offer a more satisfactory basis for a revision which should discuss with skill and learning recent development in the law, than Mr. May's well-known work.

The reviser in this instance would have done a more creditable work and one more consistent with the high standard set by the earlier editions had he devoted his attention to the intelligent and systematic discussion of the principles of the law, newly developed or to which a new application has been given in the past ten years, instead of limiting himself, as he has, to the mechanical work of collecting and digesting decisions.

The title page introduces the present edition as being "revised, analyzed and greatly enlarged," and the reviser's preface informs us that many new topics not before referred to in this index have been discussed. "These new topics include standard policies, incontestable clauses, proofs of death and of loss, addition to buildings, adjacent buildings, removal of goods, duty of the insured to read his policy, etc."

Careful examination discloses the fact, that, making due allowance for condensation of portions of the Third Edition, the reviser has added approximately seventy pages of new matter, of which not exceeding sixteen pages are devoted to the important topics which he enumerates. The new matter is collected in foot notes, and is composed wholly of citations and digests of decisions. The reader may search in vain for any comprehensive discussion of these new topics or of the old, in the material thus added. The use of the book has been facilitated by enlarging the index but in all other particulars, the style and arrangement of earlier editions remains unchanged. In short the reviser has dealt in the usual manner with a book which is quite unusual and deserving of better treatment.

While the result is somewhat disappointing to one familiar with the earlier editions, it is only fair to say that the work attempted to be done has been done with painstaking and thoroughness. In all, some three thousand cases have been added. In many instances the decisions have been given, sometimes accompanied with extracts from the opinions. Mr. Gould's labors will save many a wearying journey in search for authorities, and the value of a case when cited may generally be determined without appealing from the text to the reported case.

In fact, it may be said that the usefulness of the work which was becoming somewhat impaired by lapse of time has been fully revived in the present edition. We wish its usefulness might have been extended in a manner commensurate with the opportunity afforded by the development of the law and the absence in the field of really satisfactory works on the subject.

Reviews to follow:

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

CLERK'S ASSISTANT. By Austin Abbott, LL.D. Revised Edition. By Clarence F. Birdseye. New York: Baker, Voorhis & Co. 1900. pp. x, 1091.

ELEMENTS OF AMERICAN JURISPRUDENCE. By William C. Robinson, LL.D. Boston: Little, Brown & Co. 1900. pp. lviii, 401.

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CONFLICT OF LAWS; OR, PRIVATE INTERNATIONAL LAW. By Raleigh C. Minor, M. A., B. L. Boston: Little, Brown & Co. 1901. pp. iii, 575.

A TREATISE ON CANADIAN COMPANY LAW. By W. J. White, Q.C., assisted by J. A. Ewing, B.C.L. Montreal: C. Theoret. 1901. pp. xxiii, 708.

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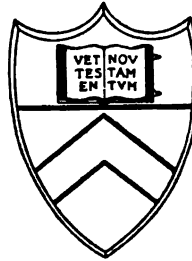
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## VESTED AND CONTINGENT REMAINDERS.

IN the course of the able and successful work accomplished by the framers of the revision of 1830, they drafted one section<sup>1</sup> relating to future estates, which has been, for many years, the source of considerable confusion.

It will be remembered that Blackstone defines vested and contingent remainders as follows: Vested remainders exist "where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent;" contingent remainders exist "where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event."<sup>2</sup> Other common law writers gave definitions varying somewhat from these in form, but those just quoted furnish a convenient, and, at least for present purposes, a correct, statement of the law.

To render a remainder vested, therefore (either absolutely or subject to being wholly or in part divested, according to the nature of the given case), the event upon which the remainder was limited to take effect must not be dubious or uncertain in the sense intended by the definition, and the person to whom the future estate is fixed to remain must be "determinate," and as a general proposition this necessary determinateness could only be achieved by designating him, in the instrument creating the remain-

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<sup>1</sup> 1 R. S. 723, § 13; Real Prop. Law, § 30.

<sup>2</sup> 2 Comm. 168, 169.

der, in terms applicable to him even while the particular estate continued.

For example, under a grant to A for life, remainder to the "children" of B, the remainder vested in B's children. But under a grant to A for life, remainder to the "heirs" of B, a living person with issue, no "determinate person" was named, for there could be no heirs of a living person, and for this reason, as well as for the reason that the particular estate might cease before B's children acquired the character of heirs, the remainder, while B lived, continued contingent. If B died during the continuance of the particular estate, the remainder in question would at once vest in his issue, because, by the fact of his death, they had become "heirs," and thus, for the first time, answered to the description in the instrument.

It should be noticed, in passing, that in any given instrument the grant or devise might be so worded as to render it clear that the term "heirs" was used inartificially, and was intended to refer to particular individuals, in which case the remaindermen might be determinate, and the remainder vested.<sup>1</sup> And so with other words which, if used in a technical sense, would be indeterminate.

Now the revisers, in connection with their general plan, phrased their definitions to cover all future estates, and to provide, while leaving the definition affecting contingent estates otherwise unchanged in substance, that future estates "are vested when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."<sup>2</sup> The form thus adopted followed almost exactly the definitions of numerous common law writers to express the same meaning expressed in other words by Blackstone.<sup>3</sup> It will be seen that the question whether contrary to settled construction, the definition thus adopted is to be read literally, may sometimes be of great importance.

<sup>1</sup> See *Heard v. Horton*, 1 Denio, 168; *Cushman v. Horton*, 59 N. Y. 149.

<sup>2</sup> 1 R. S. 723, § 13; Real Prop. Law, § 30.

<sup>3</sup> See Fearn, *Contingent Remainders* (10th Ed.), 215, 216; Greenleaf's *Cruise* (2d Ed.), I, 712; Challis, *Real Property*, 56; Preston, *Abstracts of Title*, II, 113; 4 Kent Comm., 202; *Id.* (12th Ed.), 203, note 1; 2 Washb. *Real Prop.*, 229.



Taken literally, it would mean that it is now quite immaterial whether the terms used to designate the remainderman constitute a correct present description or not, and that the sole test of the vested character of the remainder, so far as concerns the point under discussion, consists in the existence of a person who, if the precedent estate were now to cease, would at once be entitled to possession.

Under this view of the statute, a grant to A for life, remainder to his heirs, in fee (which at common law, through the operation of the rule in Shelley's case, would have given a fee to A himself), would (by virtue of the abolition of that rule in New York,<sup>1</sup> and the consequent recognition of a valid remainder in his heirs) render the remainder vested in his children, because they, although not yet "heirs," would unquestionably be persons in being who, if the life estate were now to cease, would immediately be entitled to the possession.

This view of the statute was fully set forth by Judge Woodruff in *Moore v. Littel*,<sup>2</sup> as follows:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' then that remainder is vested, within the terms of the statute. It is not 'a person who *now has* a present fixed right of future possession or enjoyment,' but a person who *would* have an immediate right if the precedent estate were now to cease. \* \* \* 'When there is a person in being,' means when you can point to a human being—man, woman or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman or child who, if the precedent estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested."

The purpose of the present article is not to question the perfect correctness, on other grounds, of the decision in *Moore v. Littel*,<sup>3</sup> or in any of the other cases to be cited, but to ascertain whether the particular and sweeping construction thus given to the statute by Judge Woodruff,

<sup>1</sup> 1 R. S. 725, § 28; Real Prop. Law, § 44.

<sup>2</sup> 41 N. Y. 66.

<sup>3</sup> 41 N. Y. 66.

which involves the startling proposition set forth by Chief Justice Savage,<sup>1</sup> that some remainders are both contingent and vested at the same moment, has in fact been adopted and established by the courts as an inflexible and invariable rule.

Moore v. Littel was decided in 1869. In the previous year the same Court, in Carmichael v. Carmichael,<sup>2</sup> had held that a devise to testator's wife for life, and from and after her decease to testator's children who might "then be living," created a mere contingent remainder in the children during the life of the widow. And in 1881, in Hennessy v. Patterson,<sup>3</sup> it was held that a certain expectant estate devised to one Foley, who would have become immediately entitled to possession if a certain Margaret, who was then in enjoyment of the lands and who had no issue, had then died, was a contingent remainder because, notwithstanding these facts, Foley was, by the terms of the instrument creating the remainder, to become entitled thereto only in case Margaret should die without issue. And in that case the Court say that the *doctrine* set forth by Judge Woodruff in Moore v. Littel, "was not assented to by three of the Judges, and the case (of Moore v. Littel) was really decided upon the ground \* \* \* that the remainder was contingent."

In Minot v. Minot,<sup>4</sup> a testator devised lands in trust for his widow, with remainder "to those persons who, if my death occurred at the time of her death, would then be my heirs at law by blood." When the will was executed, he had no issue, but subsequently, and before his death, a son was born. Testator thereafter died, leaving a widow and the son surviving. The question was presented, whether this son was "provided for" by the will, so as to obviate the result of a so-called revocation. It was held that the son, upon the death of the testator, took a vested remainder. The case hardly raises the question now under discussion, because the son did unquestionably answer to the description of "heir," his father being dead, and in favor of vesting

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<sup>1</sup> Coster v. Lorillard, 14 Wend. 302, 310, 311.

<sup>2</sup> 1 Abb. Ct. App. Dec. 309 (4 Keyes, 346).

<sup>3</sup> 85 N. Y. 91.

<sup>4</sup> 17 App. Div. 521.

he was properly to be regarded as presumptively the person who would be such heir when the widow should die. But the present importance of the opinion in the case lies in its discussion of the principle involved in the decision of *Hennessey v. Patterson*.<sup>1</sup> "The remainder in question there," say the Court, "was created in these words: 'Should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley.' It was held by the Court that the remainder in question in that case was a contingent and not a vested remainder. This estate is precisely within the definition of a contingent remainder, as given by the Revised Statutes, which is whenever the person to whom, or the event upon which, the future estate is limited to take effect, remains uncertain.

\* \* \* And while Foley *was undoubtedly the person who would have an immediate right to the possession of the land* upon the ceasing of the precedent estate, yet the certainty of his designation *did not do away with the uncertainty of the event* upon which alone his estate would vest, and therefore the remainder to him was clearly contingent."

And finally, in *Paget v. Melcher*,<sup>2</sup> there was a grant of land to a trustee in trust for the grantor's wife for her life, and upon her death to convey to his children, or, if they were deceased, to their issue, or, in the default at that time of any issue of the grantor, to other persons designated. The grantor died, leaving a widow and three children. Thereafter Henry, one of these children, died, leaving no issue, and then the widow died. Here, after the grantor's death, and during the life of Henry, the latter was a person who would have become entitled, if the widow had then died, to a share of the property. But it was held that his estate, at that time, was not vested, but contingent. It is true that there was a formal requirement of a conveyance by the trustees, instead of a direct grant in remainder, a feature discussed at length in the peculiar case of *Townshend v. Frommer*.<sup>3</sup> But whatever else may be said on that subject, it remains true that during the life of the first taker there was a person in being who, if the prior estate had

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<sup>1</sup> *Supra*.

<sup>2</sup> 156 N. Y. 399.

<sup>3</sup> 125 N. Y. 446. Compare *Campbell v. Stokes*, 142 N. Y. 23.

then ceased, would have been entitled to immediate possession, the statute,<sup>1</sup> even though previously dormant, operating to vest title in him without the necessity of any conveyance by the trustees. And the Court recognizes that Henry and the other children held future *estates*, for in summing up their discussion they say that "it follows that their *estates* were contingent."

An interesting and valuable discussion of the case of *Moore v. Littel*<sup>2</sup> will be found in Mr. Fowler's learned work on the Real Property Law,<sup>3</sup> where it is treated in connection with a question quite different from that under consideration, and where the conclusion (which, if confined to the result arrived at by the Court, and not applied to the broad doctrine enunciated by Judge Woodruff, seems perfectly sound) is arrived at, that the case was correctly decided. This conclusion is confirmed by the opinion in *Hennessy v. Patterson*,<sup>4</sup> where the Court say that the real point decided in *Moore v. Littel* was merely that the remainder, although contingent, was alienable.

The proposition thus laid down, that the decision in *Moore v. Littel* really turned on the question not whether the remainder was vested or contingent, but whether, although contingent, it was alienable, applies to many of the cases which have cited or followed *Moore v. Littel*; and such of them as are not to be explained on this ground rest on considerations quite apart from the sweeping terms of Judge Woodruff's dictum. Thus in *Byrnes v. Stilwell*<sup>5</sup> the remainder was devised to "the lawful child or children" of the life tenant, or if any of them should die before the life tenant, then to their issue. In *Surdam v. Cornell*,<sup>6</sup> there was a devise to testator's widow for life, and after her death to his children, in equal shares, for their respective lives, and upon the death of a child, its share was devised to his or her "heirs" in fee, and the testator then proceeds to

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<sup>1</sup> Real Prop. Law, § 79. See *Townshend v. Frommer*, 125 N. Y. at pp. 459, 461.

<sup>2</sup> 41 N. Y. 66.

<sup>3</sup> § 30, pp. 137-142.

<sup>4</sup> 85 N. Y. 91.

<sup>5</sup> 103 N. Y. 453.

<sup>6</sup> 116 N. Y. 305.

define this word "heirs" as meaning the children of his own children. In *Campbell v. Stokes*,<sup>1</sup> the testator devised lands to trustees in trust for his children, and directed them, upon the death of a child, to convey its respective share to its "lawful issue." And in *Losey v. Stanley*,<sup>2</sup> the testatrix devised lands in trust for her son, for his life, with remainder to his "children" or their descendants living at his death.<sup>3</sup>

The final result seems to be that the cases do not establish Judge Woodruff's opinion that a remainder must *necessarily* be vested *merely* because (regardless of the terms of description employed in the instrument to designate the remainderman), there is a human being in existence who (though not now answering to the description employed) would, under the terms of the instrument, become immediately entitled to possession if the precedent estate were now to cease.

STEWART CHAPLIN.

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<sup>1</sup> 142 N. Y. 23.

<sup>2</sup> 147 N. Y. 560. See also *Matter of Brown*, 154 N. Y. 313, at pp. 322, 323.

<sup>3</sup> With the cases last cited compare *Matter of Crane*, 164 N. Y. 71.

## THE TRIALS OF JURY TRIALS.

AN American lawyer in London can find no more instructive and fascinating occupation than wandering about the Inns of Court. He will see much that is familiar and much that is new and strange. In comparing English procedure with our own he will loyally maintain the superiority of the latter, but, probably, will be candid enough to admit that we may yet learn many valuable lessons from the former.

A few years ago I drifted into the court room of Mr. Justice Hawkins. A negligence cause was on trial. The defendant's horse had kicked the plaintiff's shin bone, with resultant damage direct and consequential. The bone had not been fractured, but the kick had produced all the familiar symptoms of permanent and progressive mental and physical disintegration, which happily, on both sides of the Atlantic, disappear soon after the verdict is affirmed on appeal. The Judge delivered a brief charge and the jury, after a short conference, during which several questions were asked of the court and answered, without leaving their seats, rendered a verdict of thirty pounds for the plaintiff. From the commencement of the charge to the rendition of the verdict scarcely ten minutes had elapsed.

Another cause was called and, to my surprise, the barrister upon whose shoulders rested the burden of proof arose and began divesting himself of that burden by an opening address to the same jury. No challenge was interposed and no questions were asked. The nature of the litigation was not stated, the names of the parties were not mentioned. It seemed to be taken for granted on all hands that the jury were a part of the court, sworn to do justice, and that both court and jury could safely be relied on to be honest and impartial.

Naturally, this scene was contrasted in my mind with similar ones in the courts of this country. In such a controversy the American judge would probably consider it

his duty to expound the law of negligence *in extenso* in its relation to horses, kicks and shin bones. Having devoted half an hour or so to the law, he would deem it expedient to enter upon a discussion of the facts, concluding with the helpful, luminous and original admonition to the jury to find for the plaintiff if they believe the plaintiff's witnesses, but in no event to do so if they believe the defendant and his witnesses. At the conclusion of the Judge's address more valuable time would be wasted in requests to charge. This ceremony, as an exhibition of legal gymnastics between court and counsel, is sometimes interesting, but no one familiar with the inconsequential nature of the proceeding can hear without indignation of a righteous verdict being upset because of an "error" then committed. So far as influence upon the jury is concerned the requests might as well be propounded in Greek and answered in Hebrew.

The practice of handing up written requests before the charge is wise and helpful, but oral requests afterwards, if taken seriously, as they sometimes are by technical appellate minds, become a grotesque and lamentable travesty on justice.

When neither court nor counsel can think of anything else to say, a situation which sometimes occurs, an officer is sworn and the jury retires. After wrangling for hours and being marched back several times for additional "instructions," a verdict is reached or a disagreement is recorded.

Let us follow a little further the American parallel. After the last exception has been noted and the jury has left the court room, another cause is called and the work of empaneling a jury commences. From twenty to thirty busy men have been compelled to remain in the court room awaiting the conclusion of the previous cause, and from these the new jury is to be chosen. Twelve men are called and take their seats in the box; this is done to start the proceedings. Then begins a series of questions which proceed upon the basal presumption that though there may be honest and competent men in the box, the competent men are not honest, and the honest men are not competent. Each juror is separately interrogated. Nothing relating to his past, present or future is omitted.

Does he know the defendant, or his partner, or his wife, or his counsel?

Can he read and write?

Does he own property, and, if so, how much?

What is his age and the nature of his business?

He is then informed as to the nature of the controversy, and should it chance to relate to an injured shin, he is asked if he has conscientious scruples against rendering a verdict for the plaintiff in a negligence suit.

A number of metaphysical problems are set before him relating to the burden of proof, and he is invited to explain his probable action in case the presiding judge encroaches upon his province.

When all have been interrogated, those who know too much and those who know too little are excused, and the catechism begins anew with those who fill the vacated chairs.

At length the plaintiff's counsel sinks down exhausted but satisfied, and the twelve are turned over to the defendant's counsel, who desires information upon an entirely new list of subjects.

At last the jury is ready to hear the testimony, but not until hours of valuable time has thus been lost.

My own experience is that this minute and prolix examination, always personal and often impertinent, is not conducive to good results. I have frequently noticed that the more experienced members of the profession accept the jury, as was done in the English case, without a word. The men are pleased at the confidence reposed in them and are incited to unusual efforts by the implied compliment that a glance alone is sufficient to convince counsel that they are entirely competent to discharge their duties honestly and faithfully.

But these are trivial and unimportant considerations when compared with the really serious defects of the jury system—defects so serious that many thoughtful men have advocated its abolition altogether. In trials of wide public interest the delay in procuring a jury often extends to weeks and months. Hundreds of busy men are inconvenienced, an enormous expense is incurred and the time of bench and bar is frittered away. As a simple and effi-



cient means of arriving at truth, trial by jury, when so impeded, becomes not only an intolerable burden, but a reproach to our jurisprudence.

Consider also the time and labor wasted by mistrials occasioned by the illness, misconduct or ignorance of some member of the jury. A short time ago we read of a verdict, which it had taken months to secure, being set aside because eleven jurors who were in accord placed blue ribbons in their button holes, thus making the one recalcitrant so conspicuous that he consented to a verdict in order to avoid publicity and criticism.

Few people pause to consider what a disagreement means. After years of preparation, involving irksome labor and the expenditure of large sums of money, the witnesses are assembled, expensive counsel are employed and the trial begins. At the end of weeks of arduous and anxious toil, when mind and body are taxed to their utmost, the cause is finally submitted to the jury with the result that they are unable to agree. It is in vain that the presiding judge points out the hardship of the situation. If he urges an agreement with too much vehemence there is danger that the verdict will be set aside by the appellate court whose members, never, perhaps, having sat at *nisi prius*, fail to appreciate the agonizing travail which usually accompanies the birth of a verdict.

It is the delay, the uncertainty, the expense, the inability to reach results, which has put the jury system out of touch with an age of intense material activity—an age when even theology and jurisprudence are taught by electricity and steam, when the survivors are not the fittest, but the swiftest, and when one who is not quick might as well be dead.

In civilized sections of our land men who seek speedy results have established their own tribunals of arbitration, while in the half-civilized and savage sections the rifle, the rope and even the stake have been substituted for the slow processes of the law. What, then, is the remedy?

It is idle to advocate the abolition of trial by jury; its foundations are laid in the organic law of the nation and of all the States, and, deeper still, in the hearts of all liberty-loving Anglo-Saxons. The general sentiment was well

expressed by the western orator with Hibernian proclivities who concluded his peroration in the following impressive words: "With trial by jury I have lived, with trial by jury I shall die."

For one, I should look upon its abolition as a deadly blow to freedom. Without it the republic would be deprived of one of its most effective weapons against absolutism, intolerance and greed. The citizens of a free State will never consent to live without it, for, with all its faults, it is the best system yet devised for the settlement of disputed questions of fact.

In all lands and in every age there are conspicuous instances of judges who have proved arbitrary, ignorant, bigoted, cruel and corrupt. Even in our own country, we have seen the ermine upon the shoulders of despicable creatures, the complaisant agents of aggregated wealth or the willing tools of political vampires. Fortunately, these instances are few, but they prove the danger of leaving the determination of controversies solely to the bench.

The jury system can never be permanently corrupted. Individual jurors may yield to improper influences, but the system will remain free, pure and honest so long as the community at large venerates freedom, purity and honesty. If the people are honest, the jury will be honest, for the jury is but a committee of the people. The jury will be no better than the community from which it springs. As our citizens generally are patriotic and virtuous, so will be our jurors.

But it does not follow that because the institution is inseparable from our government and is venerated by all, that it may not be improved. In almost every other department of human action the needs of a progressive age have been recognized. Old notions have been modified, venerable and venerated customs and establishments have been changed, pursuant to the demands of an enlightened epoch. Constitutions have changed, creeds have changed, jurisprudence has changed, but trial by jury remains in its essential features what it was when the barons insisted upon its maintenance at Runnymede. By all means let us retain it, but by all means let us improve upon it.

In the majority of civil causes it is an exceedingly cum-

bersome and inefficient method of reaching a result. Causes involving commercial transactions, expert knowledge, careful mathematical calculations, or the consideration of long and intricate accounts, and many others, which will readily occur to the practitioner, would much better be decided by a trained legal mind than by a jury. On the other hand, it might be dangerous to remove from the jury causes where the issue of fraud is presented, negligence suits and those involving injury to person and character. It may be urged that it will be difficult to draw the line between those suits which should be tried by the court and jury respectively, but the great majority of causes will naturally arrange themselves in the one category or the other and the few which lie in the debatable land between may well be left to the discretion of the court. There is very little danger of usurpation.

It is the experience of all familiar with the subject that no lawyer is anxious to decide a sharp question of fact, involving perjury upon one side or the other. If there be any excuse for sending it to a jury it is availed of in almost every instance.

Amendments to the constitution and statutes restricting jury trials to the class of causes indicated, or, at least, vesting in the court greater discretion in the matter, would afford much relief. In many of the States causes involving the consideration of long accounts may be referred, but the unyielding provisions of the Federal Constitution make the presence of a jury imperative in all common law actions unless the parties stipulate to try the cause before the judge or a referee.

In my own experience, for instance, I have sat for weeks and months in the United States Circuit Court with a jury where the questions in issue were of such a nature that by no possibility could any of them reach the jury, and yet the court was powerless to dispense with their services. Bankers, merchants, manufacturers, active men in many vocations were compelled to sit as idle listeners merely to hear verdict after verdict directed by the court. Counsel on both sides agreed that no disputed question of fact could arise and yet declined to dispense with the jury in order that no question as to the regularity of the proceeding

might be raised on appeal. And so the dreary farce went on, the court endeavoring to prevent open insubordination from irritated and persistent jurymen, recognizing, meanwhile, the absurdity of the proceeding and the justice of their plea for release.

I believe it is a mistake to think that there would be any general regret were jury trials abolished in the class of civil causes to which I have alluded. In bankruptcy and in certain admiralty causes jury trials may be demanded and yet I have never known the option availed of but in one instance.

Again, it is generally the case that disagreements result from the dishonesty, stubbornness or stupidity of one man. In almost every instance it will appear that it is a single juror who either will not or cannot understand the arguments of the other eleven. Debate soon degenerates into denunciation, the majority do not attempt to conceal their contempt and the isolated one enters into a state of intellectual coma where no persuasion can reach him. Were the law amended so that nine or ten jurors after a certain number of hours (let us say four or five) could, with the approval of the court, render a verdict, disagreements would rarely be recorded. Should such an amendment operate satisfactorily, there would probably be no objection to extending it to criminal cases, at least to misdemeanors. The requirement that several hours must elapse before less than twelve can render a verdict and the necessity of obtaining the approval of the court make hasty or ill-considered verdicts impossible. Modifications and improvements along the lines thus indicated have been tried and tried successfully in several of our States; also, I am informed, in Australia,

Again, grand jury presentments might be restricted to the more aggravated offenses, felonies and the like, without the slightest danger to our liberties.

Can anything be more absurd than the summoning of twenty-three men from their vocations and organizing them with pomp and ceremony into a dignified body to hear the testimony and pass upon the momentous question whether the defendant shall be presented for trial upon the charge of depositing an obscene postal card in the mails?

Or take another illustration: Most people will deem it incredible that at the close of the nineteenth century it is an infamous crime punishable by both fine and imprisonment to give a glass of beer to an Indian, but so it is. Draco never conceived of anything so grimly grotesque.

Until 1884 these cases were disposed of by information, and the evil was thus reduced to the minimum, but since the decision of the Supreme Court in *ex parte Wilson*, 114 U. S., 417, holding that any offense which may be punishable by imprisonment at hard labor is an infamous offense, it is necessary to present them all to a grand jury. Thus it often happens that a dozen witnesses are summoned from their homes and detained for days in a distant city at an expense of hundreds of dollars to the Government because a glass of beer or a gill of whiskey has been placed in the hands of an Indian.

To bring the machinery of a grand jury to bear upon such attenuated sins is like using one of Carnegie's steam hammers to crack a hazel nut. The expense to the people of presenting these petty offenders through the medium of a grand jury must aggregate considerably more than a million dollars annually.

I am aware that many erudite members of the profession are opposed to the slightest change regarding the delays, the disagreements and vexations of the present situation as necessary adjuncts of our civilization, and as inseparable from it as are the *habeas corpus* and the ballot.

"The stubborn juror is the sheet anchor of our liberties," says one. "The one or two jurors who obstruct an agreement by their so-called obstinacy prevent injustice oftener than they cause it," says another.

I once asked an eminent English judge why they continued the clumsy system of barristers and solicitors. He gave me a look of compassionate rebuke, the kind of look one might expect who has said something uncomplimentary of the Queen, and replied, "Why, we have always had it." To his mind this was conclusive. The point was not even debatable. A somewhat similar position seems to be satisfactory to those who, in this country, deem it sacrilege to suggest improvements. With entire respect for those who hold contrary views I venture to think that the practical is

sometimes lost sight of in the effort to reach absolute perfection.

It is, of course, possible that one man may know more than eleven, but to place in his hands the power arbitrarily to stop the wheels of litigation comes very near to sanctioning those evils which trial by jury is supposed to prevent. Instances may exist where in civil causes injustice has been prevented by a disagreement. I have never encountered such an instance, but grant that it is so. On the other side of the ledger must be placed the wasted time, the lost money, the inconvenience, the delay, the inability to gather the witnesses again and the frequent destruction of a righteous claim.

Every lawyer of long practice will recall many causes where, pending a second trial, death, insolvency or removal of witnesses has made further prosecution impossible. Justice has been strangled by inefficiency. The object of a trial is undoubtedly to arrive at truth, but it is important that the goal should be reached before mind, body and estate have been shattered in the contest.

The runner starts in the flush of youth strong in body and buoyant in hope. When almost in sight of the coveted prize he is told that he must go back and start anew. He retraces his steps and begins the weary race again, discouraged but not yet helpless. At the end of life, broken with much striving, ambition, hope and fortune gone, he clutches the prize believed to be of incomparable value, for it is inclosed in a casket inscribed with the words, "This is truth." He has "arrived at truth," but only to see the reward for which he has striven crumble into ashes in his hands. He has but strength to murmur, "Too late!" ere he sinks unconscious by the wayside.

Absolute perfection is impossible in any human institution. Perfection without practical results is imperfection. Men go to law to gain something tangible. They are not ambitious to settle the law. Success without money is like faith without works. The ordinary litigant would infinitely prefer to be defeated by a wrong verdict or an erroneous ruling, if it be done at once, than to come out victor after years of strife with nothing left but a paper decision. It takes less time and it costs less.

It may be conceded that a suit which has been tried by six juries, which has been distilled in the alembics of successive appeals, and which has finally received the seal of approval of the Supreme Court of the United States, has reached the acme of human perfection. It is probable, however, that the successful party who has disbursed three times the amount of the recovery may sigh for a system which embodies a little less perfection and a little more common sense.

Instead of simplifying legal procedure, the tendency is more and more to complicate it and to make the disposition of an ordinary lawsuit so expensive and interminable that none but the boldest combatants dare enter the lists.

Law business has been driven from the rural districts to the large cities, and it is a most curious fact that the country lawyers have been active agents in producing this result. Almost to a man they have insisted upon the right of their clients to carry the smallest dispute to the highest appellate tribunal. In other words, they have insisted upon their client's right to destroy himself. The specious argument against making the Court of Appeals "a rich man's court," has been to their minds conclusive. It never seems to occur to them that in keeping the highest appellate tribunals open to the poor man with the small claim, they are playing the game of the millionaires and the great corporations. The last decision in a cause may be right, but it is not right solely because it is the last.

What is true of fribbling and unreasonable appeals is also true of the defects and delays of the jury system—they discourage honest litigation. They are in the interest of the sharper and the monopolist. Every reform which has for its object economy and speed should be encouraged. Men with small claims used to bring their quarrels to the courts; now they settle them or put them down to profit and loss.

When the epidemic of motions, appeals, new trials and mis-trials through which every contested cause must now pass has become intolerable, a system will be devised which will give to every litigant one fair and speedy trial and one appeal. When this day arrives men will wonder how they staggered on under their present burden. One can hardly

overestimate the beneficial results that would follow if all the codes and code abominations were dumped into the sea and a new system of procedure were organized under the single watchword, *Simplicity*. More modern machinery and less of it, abler engineers and fewer of them, is what the needs of the age demand.

Although intelligent men may differ regarding radical changes in the jury system, all must admit that reforms, which have been tried and approved, looking merely to the improvement in the *personnel* of jurors, should be universally adopted. *Imprimis*, the number of exemptions should be reduced; it is now so large that except in the great cities fully half the jurors are drawn from the agricultural class. Although farmers make excellent jurors, it is the spirit of the law that all vocations should be represented in the jury box. Naturally it makes a busy man indignant to be called upon to perform jury duty when his neighbor, who has no occupation, is exempt because, for instance, he once happened to be a member of a volunteer country fire department. Men will be more willing to serve when there are no unfair discriminations.

The task of selecting jurors should no longer be left to supervisors, town clerks and assessors where favoritism and political influence are potent factors in putting on and leaving off names from the roll. In those counties where jurors are selected by a commissioner I am informed by those well qualified to speak that the beneficial results are so marked that a change to the old methods would be regarded as a public calamity. The smaller counties cannot, perhaps, afford the expense of a commissioner, but the duty might easily be delegated to the county judge or surrogate, or it might be performed by a state officer, or commissioners might be appointed for judicial or congressional districts. The *modus operandi* is not important, so long as jurors are selected by one competent, responsible authority whose business it is to see that no one is put on the rolls who is not legally, physically and mentally competent to serve. The duty of winnowing the wheat from the chaff should fall upon the commissioner, thus dispensing with the usual ceremony of calling upon jurors at the opening of the court to present their excuses. It often becomes necessary



to draw twice as many names as are needed, because the *venire* is sure to contain the names of men who are dead, exempt, deaf, blind, sick, incompetent or otherwise disqualified. If the examination were conducted out of court, these names would never appear upon the rolls. In short, when a juror is summoned he should understand that he is drafted to serve and not merely to exercise his ingenuity in inventing disingenuous excuses.

Again, the system should be so perfected that when a juror has actually served at one term he should not be called upon to serve again for a year at least, in any event. Although I have no patience with the typical shirk who is ready to resort to methods which are questionable, if not actually dishonest, to avoid his duty, I confess I have often had my sympathy aroused on behalf of men who are frequently summoned, particularly in the large cities, to do jury duty in state, federal and municipal courts and sometimes compelled to sit during several terms in a single year. Such hardships make the duty irksome and encourage the malingerer and the liar. On the other hand, were it the law that but one annual service is required, all decent and patriotic citizens would deem it a duty to serve and a dishonorable act to present an inadequate excuse.

An employer who discharges a servant while doing duty as a juror is unfit to enjoy the blessings of a free government. Stringent laws should be enacted, for the punishment of such miscreants.

In brief, the inequalities, the injustice, the unnecessary hardships at present existing should be removed, and when they are, right-thinking men will regard it as much a duty to support the institutions of our country in peace as to defend them when assailed in war.

I cannot doubt that if the reforms, thus crudely suggested, were adopted, that even the most violent assailants of jury trials would be brought to the conclusion that it is the best system devised by the human intellect for the trial of questions of fact.

In any event, discussion can only lead to beneficial results and he who contributes anything of value will have "done the state some service."

ALFRED C. COXE.

## THE NAVAL WAR CODE.

THE code of "Instructions for the government of the armies of the United States in the field," drawn up by Professor Lieber and issued as General Order 100, in 1863, in some sense marked an epoch in the history of the rules of land warfare. It was a set of rules, humane and enlightened for the times, covering the ground broadly, expressed clearly and in codified form, while the rules of other powers lacked this definiteness and depended too much upon the impulse of the commander. Upon this code as a basis, it is not too much to say that all subsequent codes have been built up, whether official or unofficial, adopted or rejected, the work of a single writer, of a commission of publicists or of a conference of the powers.

Last June there was issued by the Navy Department of the United States a code of the "Laws and Usages of War at Sea," prescribed for the guidance of the naval service by General Order 551, which is comparable in all particulars with the land code of thirty-seven years ago. Drawn up by Captain C. H. Stockton, it, too, is enlightened and specific, and like Lieber's Code, in scope and comprehensiveness is the first in the field. May it not likewise serve as a model and foundation for other codes of other powers, and thus help in the great work of unifying the laws of war?

Although Captain Stockton's Code is too long to be printed and discussed in full in the pages of this REVIEW, I have hoped that its readers might be interested in some of its more noticeable and debatable features, with occasional comparison with the rules of other navies. No authoritative statement of the latter, covering the same field, is to be had, however. Information as to their rules must be gathered from instructions for special occasions, from regulations as to particular service, from the manuals of text

writers not in codified form nor officially adopted, and from the formal works of the publicists.<sup>1</sup>

#### SECTION I.

Article 1.—The code begins with a novel and interesting statement of the special objects of maritime war. These are:

“The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property and sea-borne commerce.”

Two facts are here clearly shown. One is that, whatever the policy of the State Department may be, looking towards the exemption of an enemy's innocent property on sea from capture (which was the Marcy idea in 1856), the navy clings to the unquestionable right to prey upon an enemy's commerce. This has been our own usage from the birth of the Republic, except as surrendered by treaty with Italy in 1871. It is the usage of other maritime powers. Protection from similar attack on the part of an enemy is part of the duty of the United States Navy. All this is in accordance with the ancient rule, consistently adhered to down to the present time. Clearly if this rule is to be abrogated in the interest of innocent commerce, the movement must be initiated by some body other than a naval department. Even the International Law Associations are not ready to recommend so sweeping a change.

The other “special object” to which attention is called is the prevention of an enemy from procuring war material from neutral sources. This is a plain admission of a principle perfectly well understood, that the suppression of contraband trade rests on the shoulders of the belligerent who would be injured, and not on the neutral government. The

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<sup>1</sup> For purposes of comparison with earlier rules of naval warfare, the writer has been obliged to content himself with Snow's Manual for the U. S. A., Lushington's Naval Prize Law for Great Britain, the Instructions to the French Navy at the Outset of the War of 1870, printed in Snow's Cases, and with the treatises upon International Law, of various nationalities.

recent inquiry in Congress into the sale of horses and mules to the British Government for use in South Africa, shows that this admission is not so unnecessary as might be thought.

Article 2 describes the area of maritime warfare, which comprises all waters not neutral. This made it essential to define the extent of coast sea over which the neutral has jurisdiction.

"The territorial waters of a state extend seaward to the distance of a marine league from the low-water mark of its coast line."

This is one more proof of the wide-spread recognition of three miles as the extent of a state's coast sea. Lushington gives the British rule thus: "The territorial waters of a state are the waters within three miles of any part of her territory." But the instructions for the French Navy prescribe the other rule: "*Vous considérerez les eaux territoriales comme s'étendant à une portée de canon au-delà de la laisse de basse mer.*" And the Germans incline to the same theory. The difficulty with a cannon-shot distance to measure the width of coast sea, instead of an arbitrary three-mile zone, is that it is not exact. It would vary with every gun, with every new invention, with every year. Some conventional distance is necessary, therefore; it matters little what. But as three miles are specific, and more widely accepted than any other measurement, it is well that our code should cling to them as the proper limit of a State's jurisdiction.

In Articles 3 and 4 attention is directed to the following rule, expressed first in general terms, and afterwards more specifically:

"Non-combatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such non-combatants will permit."

"The bombardment by a naval force of unfortified and undefended towns, villages or buildings is forbidden, except where such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential at the time to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given. The

bombardment of unfortified and undefended towns and places for the non-payment of ransom is forbidden."

The rules of the Hague Conference governing land warfare forbid the bombardment of undefended places unequivocally. The rules of the Navy Department here quoted permit it where supplies are forcibly withheld, that is as a penalty for failure to furnish a ship of war with what it wants, coal, for instance. This would seem to be new ground. Neither do the rules of other navies, nor the text writers take up this exact question. The prohibition of bombardment for non-payment of ransom shows the intention of the code to be humane. Under these circumstances it may be questioned whether the exception noted is justifiable. Would not the proper procedure be to send a landing party to requisition needed supplies? Then if resistance is made and "supplies *forcibly* withheld," the town is not "undefended"; it may be seized and the ship's needs satisfied. But bombardment is so indiscriminating, so destructive a method, as to be out of all proportion to the nature of the offense which it is designed to punish. It is just this readiness to destroy innocent property in order to exert pressure that has prejudiced the minds of many against naval methods. The practice of destruction is neither a proper substitute for a landing party and taking possession in war, nor for diplomatic settlement in peace. The language of the code is also too indefinite. It specifies "*reasonable* requisitions" for "*essential* supplies," both conditions to be judged of by the ship's chief officer. The sentiment of to-day would surely agree with Lawrence<sup>1</sup> in the wish that "open and undefended places should not be bombarded at all." The usage of to-day has not declared itself in the matter under discussion. The analogy of land warfare and the code's own prohibition of bombardment to collect contributions both seem opposed to it. We conclude, therefore, that this rule is to be regretted as one of the few points in the code open to criticism.

The next topic of the code treats of submarine cables in war. It will be remembered that in the international

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<sup>1</sup> Page 443.

treaty of 1884 for the protection of submarine cables, Article XV, it is expressly laid down that "the stipulations of this Convention shall in no wise affect the liberty of action of belligerents," and the United States Navy in the Spanish war cut them freely. What the aforesaid "liberty of action" means, the code undertakes to lay down. It divides (Art. 5) submarine cables into three classes: Those between enemy's points or between the United States and hostile territory; between neutral territory and an enemy; between neutral points. The first, irrespective of ownership, are "subject to such treatment as the necessities of war may require." The second "may be interrupted within the territorial jurisdiction of the enemy." The third shall be inviolable. This is all reasonable and good. Of course it was not the province of the Navy Department to speak of damages for cutting cables, nor is the belligerent's liability clear. The damage is two-fold, from destruction of plant and from interruption of traffic. The first is usually a mere break and easily repaired. The second can in many cases be lessened by military control and a censorship. Liability for damage resulting from these causes has not been discussed by text writers, nor determined in the courts or by negotiation as yet, so far as I am aware. If the analogy of land telegraph wires and railway lines, leading from neutral to enemy's territory, were followed, it would seem that the rules should forbid wanton destruction, permit military use, admit liability for damage, to be settled after the war, and require restitution of neutral plant as soon as necessity permitted.<sup>1</sup> But the analogy is not a perfect one, and the feasibility of continued commercial use under military censorship tends to make complete stoppage of business less excusable.

Somewhat similar is the neutral's right to indemnity in case of seizure of his vessels on the ground of military necessity, which the next article (6) rules upon:

"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military pur-

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<sup>1</sup> Hague Convention, Art. 53 and 54: "et les indemnités seront réglées à la paix."

poses, but in such cases the owners of neutral vessels must be fully recompensed."

This is the *jus angariæ*. An illustration would be the seizure and sinking in the Seine of six English vessels in 1870 by the Germans to bar the ascent of the river by French gunboats. The Germans excused their act on the ground of pressing military necessity, and paid for the property destroyed. They are said, however, to have suggested that since it was the menace of French gunboats which necessitated the deed, the claim for damages should properly lie against France rather than Germany.

Article 7 :

"The use of false colors in war is forbidden, and when summoning a vessel to lie to, or before firing a gun in action, the national colors should be displayed by vessels of the United States."

Just what is and what is not good form in the deception of one's enemy it is puzzling for the civilian to guess. In land warfare you may not make improper use of the enemy's flag or uniform, but you "may employ ruses of war, and circulate false information"<sup>1</sup> So Lushington<sup>2</sup> says :

"A commander may chase, but under no circumstances may fire, under false colors."

Ortolan, himself a French naval officer, permits false colors until the fight opens. Calvo allows them for escape, but never for attack. Thus the rule of the code is an advance upon the usage of other States ; it is also an improvement upon our own earlier usage, which, as stated in Snow's Manual for the use of the United States Navy (page 92), permitted the use of a foreign flag to deceive an enemy but hauled it down before a gun was fired.

## SECTION II.—BELLIGERENTS.

The section entitled " Belligerents " defines lawful combatants on sea, the Naval Militia and Reserve, for instance, distinguishes non-combatants and prescribes the treatment of both. Attention is directed to but one article here, No. 11 :

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<sup>1</sup> Hague Conv., 23, 24.

<sup>2</sup> Rule 17.

"The *personnel* of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses or as prisoners of war, when, by training or enrolment, they are immediately available for the naval service of the enemy, or they may be released from detention or confinement."

Here the question is whether individuals in the crew of an enemy merchantman can be properly held as prisoners, as the code permits. The present usage of naval warfare undoubtedly allows this, and does not condition it, as the code does. But it may be questioned whether this is not a severity which reason and humanity unite in discouraging. The reason given in justification of the present rule is that certain seamen are fit "for immediate use on ships of war"<sup>1</sup> So, if a hostile army invaded France or Germany, would every peasant be fit for immediate use in war because he had once served under the colors? It would seem that the distinction between combatants and non-combatants should be one of fact, not one of a possible intention. Here are enemy's subjects engaged in an innocent occupation, having no relation to war. There is no proof of a wish to serve on a warship. Service on the merchantman is evidence to the contrary. The sending of their ship to a hostile port for adjudication further removes the crew from likelihood of service. Why should imprisonment be added to the hardship of capture and loss of wages and the suffering of those dependent? This is not finding fault with our Naval Code—that follows usage. We merely suggest this as a desirable innovation—humane, rational and by no means dangerous.

### SECTION III.—BELLIGERENT AND NEUTRAL VESSELS.

Section III, on Belligerent and Neutral Vessels, reflects the best modern usage. It exempts from capture "coast fishing vessels innocently employed," following the decision of the Supreme Court in the case of the Spanish smacks *Paquete Habana* and *Lola*<sup>2</sup> rendered in January, 1900.

It allows the destruction of an enemy's merchantmen in case of necessity. Such excuse for scuttling or burning a

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<sup>1</sup> Hall, 2d Ed., p. 369.

<sup>2</sup> 175 U. S. 677.



ship instead of sending in for trial would be inability to spare a prize crew, unseaworthiness, want of an open port. But in such case a survey and inventory must be taken and lodged with the Prize Court.

Article 15 allows free passage to the merchant vessels of an enemy sailing from a United States port prior to the declaration of war, unless engaged in guilty traffic. The same in port are given thirty days to load and sail. And enemy's ships bound for our ports before the outbreak of war may enter, discharge cargo and proceed to any port not blockaded. President McKinley's proclamation of April 26, 1898, exemplified this usage.

The violation of neutrality involved in an increase of armament or crew in a neutral port is forbidden.

The neutral flag covers enemy's goods, showing that, although not a party to the Declaration of Paris of 1856, and not entitled to its benefits, the United States yet is bound by its rules.

The final rule in this section recalls the later usage of the Civil War. Neutral mail steamers bearing hostile despatches as the ordinary business of a mail carrier

"are not liable to seizure and should not be detained, except upon clear ground of suspicion of a violation of the laws of war with respect to contraband, blockade or un-neutral service, in which case the mail bags must be forwarded with seals unbroken."

#### SECTION IV.

We come next in Section IV to the regulations affecting hospital ships. It will be remembered that the rules of 1868, to extend the Geneva Convention to naval war, were not ratified by the signatories. This matter was taken up at the Hague in 1899 and a convention agreed upon, which the United States Senate ratified on May 4, 1900. The rules thus adopted are, therefore, binding upon the navy, and we should expect to have them incorporated into its code. In great part they have been, and presumably would have been in whole, but for the fact that the code, issued June 27, 1900, must have been in press when the convention was ratified. The omission relates to the authorization

of neutral hospital ships. At the conference the status of men picked up by these was called in question. Were they to escape under the protection of the neutral flag, as so many of the crew of the *Alabama* did, picked up by the English yacht *Deerhound* off Cherbourg? Or should they be handed over to the victor or set ashore on parole? This was Captain Mahan's main stumbling block in committee, and this prevented his signing the Convention with the rest. He had urged that no neutral hospital ships should be licensed, that all such offering aid should bear the flag of and be subject to one belligerent or the other. The code bears the stamp of his objections. It exempts from capture public and private ships of either combatant, licensed and fitted for hospital service. They shall give relief without regard to nationality, must take their chances in an engagement, are under orders to the fleet with which they unite and must be clearly marked white with a red strake. Then a third class of vessels is authorized to do similar work—merchantmen, yachts or neutral vessels near by. These may gather up the wounded, but shall then report "to the belligerent commander controlling the waters thereabouts," and cannot carry off the rescued men without permission. All rescued sick and wounded are thus to be considered prisoners of war, and may be sent to their own, to a neutral or to the enemy's country as the controlling power wills, with the condition of no further service in that war.

These three classes of licensed vessels are copied from the Hague Convention. The additional class which that includes, but which the code omits, consists of hospital ships "equipped in whole or in part at the expense of neutral individuals, or of societies officially known." These are to be respected and exempted from capture, if the neutral power to which they belong has commissioned them, and given their names to the belligerents.

Whether the American objection to this provision is justified or not, the provision itself is apparently now obligatory. And certainly, compared with the value of the whole, the defect in this clause is trifling. For the general adoption of the Geneva rules for use on sea is a step towards the general adoption of a naval war code. And with a set of rules to govern war, both on land and sea, we

shall have advanced a long ways towards that most desirable goal, the unification of the rules of International Law.

#### SECTION V.—THE EXERCISE OF THE RIGHT OF SEARCH.

This is confined to properly commissioned vessels of war, and neutral convoys are exempt from it,

“under escort of vessels of war of their own State \* \* \* upon proper assurances, based on thorough examination, from the commander of the convoy.”

Here, for the first time, the United States and Great Britain part company in their practice concerning this matter. Both have stood out in their prize law against the continental doctrine that ships under neutral convoy are exempt from search without a treaty provision to that effect. Thus, in 1870, the instructions to the French navy were as follows: “*Vous ne visiterez point les bâtiments qui se trouveront sous le convoi d'un navire de guerre neutre,*” but in case of suspicion that the convoying officer has been deceived, he shall make search alone; while Lushington says: <sup>1</sup>

“Vessels under neutral convoy are not on that ground exempt from visit, search and detention.”

The United States had in 1887 ten treaties granting the right of convoy, that with Italy of 1871, and the rest with American States; and the political branch of our Government has long inclined to concede and to claim the right of convoy. These are the influences which are reflected in the code provision. But it may well be doubted whether as a concession to the neutral it is really valuable. Hall ends his discussion of the topic as follows: <sup>2</sup>

“It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals. It is fortunate, in view of the collision of opinion which exists

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<sup>1</sup> Sec. 280.

<sup>2</sup> Page 681.

on the subject, that there is every reason to expect that the use of convoys will be greatly restricted in the future by the practical impossibility of uniting in a common body vessels of very different rates of speed, superior speed having become an important factor in commercial success."

This section also lays down with much particularity the way in which a search shall be conducted, following good usage and the provisions of many of our treaties, to avoid unduly arousing the susceptibilities and encroaching upon the powers of that sovereign individual, the merchant skipper.

#### SECTION VI.—CONTRABAND OF WAR.

This section well illustrates the clear and simple arrangement of the code. Contraband goods are of two sorts, those ordinarily used for warlike purposes; those, *ancipitis usus*, which when destined for specific military use, are also contraband. Apart from the treaty lists, which are so common, the code declares that articles conditionally and unconditionally contraband will be duly and publicly announced at the outset of a war. Then follows a list of articles absolutely contraband, which illustrates modern inventiveness, and this smaller list of conditionally contraband:

"Coal when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs; and money when such materials or money are destined for the enemy's forces; provisions when actually destined for the enemy's military or naval forces."

That coal, money and provisions may, under certain circumstances, be contraband, is the law as British and American writers, courts and naval officers understand it. But France and Russia deny any occasional contraband character to coal. The phrase, "actually destined for the enemy's military or naval use," is very similar to the language of the Supreme Court in the *Commercen*<sup>1</sup> which declared provisions contraband when "destined for the army or navy of the enemy, or for his ports of naval

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<sup>1</sup> 1 Wheat. 382.

or military equipment." A mere hostile destination, then, is not enough to give provisions a contraband character, and several writers of repute, Wheaton and Hall, for instance, think that they should be bound for a place actually invested or blockaded, which was the contention of the United States Government in 1793, when England seized American provisions destined for all French ports. This is also the continental doctrine. Great Britain objected in 1885 when France, in conflict with China, made rice, bound for open Chinese ports, contraband. And the United States again protested, when provisions for the Portuguese port of Lorenzo Marques, but probably destined for Boer consumption, were seized by British cruisers; and the practice was stopped. Thus our code follows the decisions of the British and American courts, while all governments try to secure the widest commercial liberty possible for their citizens.

#### SECTION VII.—BLOCKADE.

The laws of blockade in general do not involve much that is disputable, and the code treatment of this important topic is adequate and good. Thirty days are allowed for neutral ships to load and leave a blockaded port. If intent to break blockade can be shown, liability to capture attaches from the very outset of the voyage. The crews of blockade runners are not lawfully prisoners, but certain of them may be detained as witnesses before the Prize Court. These three rules all recall our own usage as worked out in the Civil War.

The final section, IX, allows the naval commander to conclude a truce or capitulation with the enemy, limited strictly to his own force. With the nearest cable cut, and his departmental head some thousands of miles away, he needs wide powers and can be trusted with them. On the other hand, a general armistice is solely a governmental act.

"Acts of war, done after the receipt of the official notice of the conclusion of a treaty of peace or of an armistice, are null and void."

. It might have been added that acts of war, done after the conclusion of a truce or peace, but before the news of

it had reached the distant combatants, must be undone or compensated for as far as possible. It will be remembered that the fall of Manila took place after the signature of the protocol, which served as a basis for the treaty of peace with Spain, but before news of it reached the Philippines. On this ground, at Paris, the legality of the capture of Manila was contested. But as the protocol itself surrendered the city subject to future disposal, the question was not a vital one.

A few general remarks may properly bring this commentary to an end.

The Admiralty Courts of the United States have naturally followed British rather than foreign decisions in prize cases. On the other hand, the national policy, being that of a State usually peaceful and neutral, has in many respects adhered to continental doctrine. These two tendencies have caused an occasional want of harmony between two branches of the Government, both of which are influential in the shaping of our rules of naval capture. This code accordingly reflects both, but subject, nevertheless, as its final article (55) declares, "to all laws and treaties of the United States that are now in force, or may hereafter be established."

And so one detects in it now a bit of navy prejudice, now a bit of government policy, and now the influence of a Supreme Court decision. But including all, above all, it purports to be the accepted rules of the International Law of to-day. As such it is to be judged, academically now, practically in future war. And my judgment is altogether favorable. As a compilation and interpretation of the law for the guidance of the navy, it is modern, clear, enlightened and rational, a credit to the department which issues it, and to the gentleman whose name it bears.

THEODORE S. WOOLSEY.

# COLUMBIA LAW REVIEW.

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## NOTES.

INSURANCE—VENDOR A TRUSTEE OF INSURANCE MONEY FOR VENDEE—SUBROGATION OF INSURER TO RIGHTS OF VENDOR.—*Skinner v. Houghton*, 48 Atl., 85. SEE RECENT CASES.—The Court of Appeals of Maryland has just rendered a decision of extreme importance in insurance law, holding, in an executory contract for the sale of insured premises, the vendor after loss is a trustee of the insurance money for the vendee. The Court proceeded on the theory that as equity in other respects had consistently treated the vendor and vendee as trustee and *cestui que trust* (see 1 COLUMBIA LAW REVIEW, 1-10), the same rule should be here applied. In England it is settled that the vendee has no right to the insurance money. *Poole v. Adams*, 12 W. R., 683 (1864); *Rayner v. Preston*, L. R., 18 Ch. D., 1 (1881). In the U. S. what little authority there is seems to be in favor of case at bar. *King v. Preston*, 11 La. Ann., 95 (1856) follows the English rule; but in Pennsylvania and Maryland the opposite doctrine appears firmly established. *Ins. Co. v. Updegraff*, 21 Pa. St., 513 (1853); *Reed v. Lukens*, 44 Pa. St., 200 (1863); *Hill v. Cumberland Valley Co.*, 59 Pa. St., 474 (1869); *Parcell v. Grosser*, 109 Pa. St., 617 (1885); *Brewer v. Herbert*, 30 Md., 301 (1868); *Ins. Co. v. Kelly*, 32 Md., 421 (1870); *Callahan v. Linthicum*, 43 Md., 97 (1875), making mortgagee a trustee for mortgagor, *semble*, though subrogating in-

suror to mortgagee's rights where the latter insured for his own benefit only—2 dissenting; *Trust Co. v. Boardman*, 149 Mass., 161 (1889), mortgagor and mortgagee. In *Gilbert v. Port*, 28 O. St., 276 (1876), there is a long discussion of the topic in general, but the case was eventually decided on another ground and cannot be cited as authority on either side of the proposition in hand; while *Williams v. Lilley*, 67 Conn., 50 (1895), was expressly decided on its peculiar facts. There appear to be no other cases, either English or American, touching this point. The question, however, bears on the kindred topic of subrogation of the insurer to the insured's rights for the purchase money against the vendee, the decision in the main case logically requiring a refusal to subrogate. But *cf. Callahan v. Linthicum*, *supra*. In England again the opposite doctrine prevails, and subrogation is allowed. *Castellain v. Preston*, L. R. 11 Q. B. D., 380 (1883). In the U. S. there is even less authority than on the first point. *King v. Ins. Co.*, 7 Cush., 1 (1850), contains a dictum by SHAW, C. J., against allowing subrogation; but Massachusetts does not allow subrogation to a mortgagee. *Trust Co. v. Boardman*, *supra*. In *Ætna Ins. Co. v. Tyler*, 16 Wend., 385 (1836), there is a dictum contra *King v. Ins. Co.*; but *Clinton v. Hope Ins. Co.*, 45 N. Y., 454 (1871), expressly reserves the point. See also *Thomas v. Montauk Ins. Co.*, 43 Hun, at 223 (1887). *Benjamin v. Ins. Co.*, 17 N. Y., 415 (1858), and *Wood v. Ins. Co.*, 46 N. Y., 421 (1871), can be distinguished on the ground that the vendee paid the premiums and that the insurance was for his benefit, in accordance with the usual doctrine as to mortgagor and mortgagee. In Maryland, *Ins. Co. v. Kelly*, *supra*, is a square decision against subrogation.

The English cases appear to hold the better considered doctrine. As between vendor and vendee, if the loss for accidental destruction of property were held to fall on vendor, making him a trustee of the insurance money would be merely a convenient way of adjusting the loss. This might be one explanation of the Massachusetts doctrine. See *Wells v. Calnan*, 107 Mass., 514 (1871), putting loss on vendor though there is authority for distinguishing this case on the ground that it is a decision at law (1 COLUMBIA LAW REVIEW, 101). In Massachusetts, also, there is no subrogation of the insurer to the rights of the mortgagee, *Trust Co. v. Boardman*, *supra*, so that the courts in that State are only logically applying their doctrine to the case of vendor and vendee. But in other jurisdictions, including Pennsylvania and Maryland, that there may be subrogation to a mortgagee is generally admitted, also that the loss in an executory contract of sale should fall on the vendee, and that the contract of insurance is one of personal indemnity only and does not run with the land. See cases, *supra*, and *Heller v. Bank*, 99 Md., 621 (1899). It is difficult to reconcile with these principles the American decisions on the subjects under discussion. In the latter, the pivotal idea seems to have been a disinclination of the courts to allow the insurer to derive benefit as they thought, at the expense of the vendee. But it must be remembered that



the contract of the insurance company was to indemnify the vendor and him alone; that the premiums paid were compensation for that risk only, and that where he is still entitled to the full purchase price, to deny subrogation is to make the company an insurer for the vendee as well. The objection as between the vendor and vendee, that the vendor is not in equity entitled to more than he bargained for, *i. e.*, to the insurance plus the full purchase price, is met by subrogating the insurer. This likewise does away with the argument of public policy, tending to discourage negligence on the part of the vendor. On the other hand it may be urged that subrogation should be operative only as against a wrongdoer or one guilty of negligence; but there is what looks like strong authority to the contrary in *U. S. v. Amer. Tobacco Co.*, 166 U. S., 468 (1896), insurer subrogated to rights of insured against U. S. to be refunded value of revenue stamps accidentally destroyed. Even admitting that premise, the vendee here may be deemed negligent for failing to insure his interest. Finally, it has been said, that where the vendor continues to pay premiums for the *full* value of the property he must be presumed to do so for the benefit of the vendee as well as his own, that therefore he must hold as trustee, and that there can be no subrogation by analogy with the recognized doctrine with regard to mortgagor and mortgagee. But this, as is submitted, is not only a presumption contrary to fact, but is against the express stipulations of the policy. Moreover, it is hard to see how a vendor who, admittedly, alone has the right to sue on a policy which does not run with the land, should, *ipso facto*, by the occurrence of loss become a trustee of the money recovered thereunder. For these reasons the English decisions would appear the sounder and more in conformity with rules well established in the case of mortgagor and mortgagee. [For bare statements on the subject in general, see *May, Insurance* (4th ed., 1900), § 456, 456a, 457; *Joyce, Idem* (1897), §§ 3525, 3569; and for short discussions, *May*, pp. 1046-7; *Richards, Idem* (1898), §§ 32, 158 and at p. 294.]

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INSURANCE.—FORFEITURE OF POLICY FOR BREACH OF ALIENATION CLAUSE.—The case of *Skinner v. Houghton* (See RECENT CASES) also involved the question of what shall constitute a change of interest under the alienation clause of the standard free policy. It is a square decision against what a recent writer has declared to be the rule understood and acted upon by the insurance companies and the legal profession generally. *Richards on Insurance* (1898) §147. Under the old form of policy, collected with decisions in *May on Insurance* (4th ed., 1900), at pp. 575-9, providing against any "change in title or possession," the decisions were uniform that a contract to sell unaccompanied by change of possession was not such a change as to work a forfeiture. *May, supra*, §267; *Joyce on Insurance* (1897), §2284. But the language of the standard policy is broader, covering every "change in interest, title or possession." This was clearly intended to mean every insurable "interest," equit-

able as well as legal, but a doubt arises owing to the tendency of the courts to construe the policy most strongly against the insurance companies. Apparently there is very little authority on the subject.

In *Erb. v. German-Amer. Ins. Co.*, 67 N. W., 583 (Iowa, 1896)—standard policy—there was an agreement to exchange the insured property for land not later than a given date, but the agreement was never executed. It was held there had been no change of possession or right of use, but merely an agreement to make a change in the future, and consequently no change of interest within the meaning of the policy. *Ins. Co. v. Wilson*, 55 S. W., 935 (Ark., 1900), was a contract to sell, but no payment had been made and the vendor was still in possession. The provision was that the "policy should be void if the interest of the assured became other than the entire ownership." The Court in a dictum assuming "interest" to mean something different from "title," held there had been no breach. On the other hand, in *Gibb v. Phila. Fire Ins. Co.*, 59 Minn., 267 (1894)—standard policy—the Court said, "the word 'interest' is broader than the word 'title' and includes both legal and equitable rights." The vendee here, however, had entered into possession under the contract, though the Court added, "it is not necessary to consider the question of the change of possession except in so far as it 'strengthens' the interest acquired by the vendee." Finally, in *Germond v. Home Ins. Co.*, 2 Hun, 540 (1874), a contract of sale and part payment of the purchase money was held to work a forfeiture under a clause worded "if the interest of the parties therein shall be changed." Probably there was no change of possession, though the fact is not stated in the record. Cf. also *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279 (1862); *Edmunds v. Ins. Co.*, 1 Allen, 311 (1861); *Abbott v. Hampden Ins. Co.*, 30 Me., 414 (1849).

The present case would seem to be the first square decision as to the effect of such a contract under the standard policy, and on principle it is submitted the reasoning of the Court is unanswerable. The vendee had an insurable interest in the property and one which he could enforce by specific performance. Conversely, in most jurisdictions, the vendor was entitled to the full purchase price even after the destruction of the property (1 COLUMBIA LAW REVIEW, 1-10). Hence, it could not well be said that there was no increase of risk, and that the vendor any longer had that "unconditional and sole ownership" stipulated for in another part of the policy. Under this latter clause a vendee in possession with an equitable right to the whole title unencumbered has been held the unconditional and sole owner; while though the insured be invested with the legal title, if the equitable estate and the right to the legal estate are in another, the policy is voided unless the fact is stated. See *Richards, supra*, §143, and cases cited. The decision in the main case seems only to carry out this reasoning to its logical conclusion; and the same should be held, even though no part of the purchase price had yet been paid, as the vendee until default has a good equitable interest.

LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS.—“It is, perhaps, impossible to define with precision what limitations exist upon the power of the Legislature over municipal corporations.” Dillon on Mun. Corp., 4th Ed. (1890), Ch. IV, § 68. The case of *People ex rel. Rodgers v. Coler* (see RECENT DECISIONS) is an important one in this connection. It decides that the New York Legislature cannot compel a municipal corporation to pay laborers on public work the “prevailing rate of wages,” and to stipulate in contracts for public work that all laborers employed thereon shall receive wages at the said rate—higher than that which might otherwise be agreed upon, thus raising the cost of the work to the corporation. The decision is based (1) on Art. VIII, § 10, of the State Constitution, which provides that no county, city, town or village shall be allowed to incur indebtedness except for county, city, town or village purposes; and (2) on the broad theory that the Legislature cannot interfere by compulsory laws with the “private” concerns of municipal corporations.

The first ground of the decision seems sound. All municipal contracts and disbursements render taxation necessary. *Weismer v. Village of Douglas*, 64 N. Y., 91 (1876). So the right of a city to contract and spend must be limited by the right to tax, which can only be exercised for a public purpose, whether by the State or some subordinate part thereof. *Loan Assn. v. Topeka*, 20 Wall., 655, 660 (1874). Hence every “city purpose” must also be a public purpose. *Sun Publishing Assn. v. Mayor*, 152 N. Y., 257, 265 (1897), HAIGHT, J.; 8 App. Div., 230, 235, 269, BARRETT and INGRAHAM, J. J. The question, therefore, in *People v. Coler*, under Art. VIII, § 10, was whether the advantage of a particular class of workmen was a public purpose justifying taxation. The court decided that it was not. PARKER, C. J., and HAIGHT, J., dissenting, cited *Mayor v. Tenth National Bank*, 111 N. Y. 446 (1888), which held that the Legislature could make the city repay money advanced to it in time of emergency, which money the city did not legally owe. That case followed *Gulford v. Supervisors*, 13 N. Y., 143 (1855), which allowed the Legislature to tax a town to pay the claim of an official who had failed to recover the sum in a prior action. Yet, except in cases like *Gulford v. Supervisors*, it has never been maintained that the moral sense of the Legislature should guide in ascertaining the meaning of the term “public purpose.” In so far as those cases sustain such a theory, they can hardly be supported. (On Art. VIII, § 10, see *Bush v. Supervisors*, 159 N. Y., 212 (1899), which held that a county, though of its own accord, and with the consent of Legislature, could not be allowed to pay gratuities to soldiers in the civil war.)

The second ground of the decision in *People v. Coler* is the more interesting. In *Bailey v. Mayor*, 3 Hill, 535 (N. Y., 1842), the private functions of a city corporation were distinguished from its governmental attributes for the purpose of holding the city liable in a tort action. This is quite different from giving a city the privilege of freedom from State control, because of its private character. In *Darlington v. Mayor*, 31 N. Y., 164 (1865), DENIO,

C. J., attacked the distinction when turned into an argument against the validity of a statute making property of the city liable for damages suffered from riots within its limits. In *People v. Flagg*, 46 N. Y., 401 (1871), a municipality was compelled to issue bonds to build roads entirely within its borders. The town was not consulted in regard to this matter of local concern; and it was forced not only to pay out money, but also to contract, by issuing its bonds. In *People v. Batchellor*, 53 N. Y., 128 (1873), the court refused to make a town assume the relation of stockholder to a railroad corporation; and referred with approval to *Atkins v. Randolph*, 31 Vt., 226 (1838), which denied to the Legislature power of appointing a liquor agent for a town and of making the town liable on contracts entered into by this agent, because, though the measure was intended as a police regulation, the State could not compel the town to contract in its "private" capacity. DENIO, C. J., had disapproved of the Vermont case. In *Duanesburg v. Jenkins*, 57 N. Y., 177 (1874), a town was forced to issue bonds in help of a railroad, and the authority of *People v. Batchellor* was expressly limited to the point actually decided. In all these cases the purpose was public and so the legislation was valid in its relation to the taxing power. [As to railroads see *Bank of Rome v. Village of Rome*, 18 N. Y., 38 (1858).] In *Guilford v. Supervisors*, and *Mayor v. Bank*, *supra*, we have other cases which supported mandatory legislation over local concerns. Cf. also *Knaff v. Newton*, 1 Hun, 268 (1874). In *Webb v. Mayor*, 64 How. Pr., 10 (Sup. Ct., 1882), it was held, that the city could not be made to tear down a reservoir without receiving due compensation. In its turn *Darlington v. Mayor* was expressly limited to the point actually decided. But in *Focci v. Mayor*, 73 Hun, 46 (1893), a mandatory act to collect from the city half the expense of freeing a street from railroad tracks was supported. The need of local consent as to a park was a point expressly not considered in *Matter Appl'n Mayor*, 99 N. Y., 569, 584 (1885), where the statute was not mandatory. The Rapid Transit Act was not mandatory (L. 1891, c. 4, § 5); but in the *Sun Publishing case*, *supra*, p. 265, HAIGHT, J., in a dictum, says of a city improvement: "It must be \* \* \* sanctioned by its citizens." The legislation regarding Prospect Park (L. 1859, c. 466; L. 1861, c. 340, § 10), and the New York City water supply (L. 1883, c. 490, §§ 1, 16), however, was mandatory. In *People v. Coler*, the court cites with approval *Board of Education v. Blodgett*, 155 Ill., 441, 450 (1895), which held that the Legislature could not deprive a school district corporation of the benefit of the statute of limitations. This last case seems opposed to *Guilford v. Supervisors*. The court also approves of *People v. Batchellor*; and of *Park Comr's v. Detroit*, 28 Mich., 228 (1873), the leading case on the private character of municipalities, where it was held, per COOLEY, J., that the State could not force a city to lay out and pay for a park. The dictum of HAIGHT, J., followed by the judgment in *People v. Coler*, apparently commits the New York courts to JUDGE COOLEY's theory of the nature

of municipal corporations, which JUDGE DENIO opposed. The difference between the conceptions of these two judges and their respective followers is fundamental. On the one hand municipal corporations are regarded simply as agents of the State and nothing more; on the other hand they are considered as existing primarily for the benefit of the separate localities in the State, not simply for the convenience of the State as a whole. By the advocates of this latter view it is said, that, though municipal corporations have no vested rights in governmental powers as against the State, *People v. Morris*, 13 Wend., 325 (1835), they are also private corporations, with the rights of private corporations in regard to property and contract rights.

The State, *e. g.*, cannot force them to contract [*quaere*, issue bonds?] any more than it can compel private corporations to contract.

Nor can (*semble*) the State wholly destroy their corporate existence, if their charters, as in the case of the City of the New York, antedate the period when the State reserved to itself the right of charter amendment and repeal.

Hitherto the United States Supreme Court has refused to consider municipal corporations "private" in such a sense that obligations could not be forced on them individually without violating the "due process of law clause" in the XIVth amendment. See *Williams v. Egleston*, 170 U. S., 304 (1897), where a town was made to pay the cost of a bridge. It will be interesting to observe what may be held on appeal in a case like *Dunmore's Appeal*, 52 Pa. St., 374 (1866), where the Legislature was allowed to deprive a municipal corporation of the right of trial by jury.

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**SALES—INSTALMENT CONTRACT—EFFECT OF FAILURE TO PAY INSTALMENT OF PURCHASE-PRICE.**—What kind of default by one party to an instalment contract will justify the other in refusing to perform subsequently is a subject on which courts differ. The English doctrine laid down by the House of Lords in *Mersey Steel Co. v. Naylor*, 9 App. Cas., 434 (1884), which was a case of a failure to pay an instalment, is that there must be an intention shown by the defaulting party to abandon the contract. In *Norrington v. Wright*, 115 U. S., 188 (1885), the Supreme Court declared that failure by the vendor to deliver the first instalment of goods as per contract was ground for repudiation by the vendee, though in that case the vendor had shown his intention to continue performance. This doctrine has been extended to a failure by the vendor to deliver any subsequent instalments. *Cresswell v. Martindale*, 63 F. R. 84 (C. C. A., 1894). It is a poor rule which does not work both ways, and, logically, it would seem that the same effect should be given to a failure on the part of the vendee to make an instalment payment. The appropriateness of such a doctrine was well pointed out in the Scotch case of *Turnbull v. MacLean*, 1 Session Cas., 4th Series, 730 (1874). In that case the Lord Justice Clerk said (on p.

737): "It is said that the settlement of the price of the November deliveries was a matter altogether apart from the obligation to deliver in December, that the time of the payment was not of the essence of the contract and that, however long the settlement was delayed, the obligation to continue the supply remained. I think this a position entirely untenable. \* \* \* It cannot be said that the time of payment was less of the essence of the contract than the payment itself." Lord Neaves (on p. 739) puts it thus: "In a contract of labor in which monthly payments are stipulated, could it be said that if the servant has not received payments for the last month, that has nothing to do with his obligation to work during the next month? Indeed if one month's pay can be refused, every successive month's pay can be refused. In most of these cases payment for each month is the means for enabling the party to fulfill his contract for the next month."

This sound view obtains in a number of American jurisdictions. *Stokes v. Baars*, 18 Florida, 656 (1882), *Moore v. Taylor*, 42 Hun, 45 (N. Y. 1886); *Winchell v. Scott*, 114 N. Y. 640 (1889); *K. S. Co. v. Inman*, 134 N. Y. 92 (1892); *Wharton v. Winch*, 140 N. Y. 287 (1893); *The G. H. Hess Co. v. Dawson*, 149 Ill. 138 (1894); *Beatty v. Howe Lumber Co.*, 77 Minn. 272 (1899); *Faber v. Hougham*, 36 Oregon, 428 (1900). In the Federal Courts, however, Mr. Justice Gray's implied approval of the case of *Mersey Steel Co. v. Naylor* in his opinion in *Norrington v. Wright* seems to have induced a different theory, and failure to pay an instalment of the purchase-price of goods is not considered a breach which goes to the essence. In the case of the *Cherry Valley Iron Works v. Florence Iron Company*, 64 F. R. 569 (C. C. A., 1894), Judge Severens, writing the opinion for the Circuit Court of Appeals for the Sixth Circuit, put the vendor's right to repudiate on the express terms of the contract, and said (on p. 572) that in the absence of such provisions a failure by the vendee to pay "not evincing a renunciation of the contract" is on a different basis from breach by the vendor, and does not discharge the other party from his duty to go on with the contract. He mentions Mr. Justice Gray as recognizing *Mersey Steel Co. v. Naylor* as "authoritative" on that point. The *ratio decidendi* of the latter case was the defaulting party's apparent intention in regard to future performance; in *Norrington v. Wright* this was disregarded. So, although the two cases may be distinguished on their facts,—the former dealing with a breach by the vendee and the latter with a breach by the vendor—they are opposed in theory and it was unfortunate that Mr. Justice Gray treated the *Mersey* case as he did.

Under the influence of the case of the *Cherry Valley Iron Works v. Florence Iron Co.*, the Circuit Court of Appeals of the same circuit has held in a recent case that a vendor will be liable in damages to the vendee in an instalment contract, if, on the vendee's failure to pay instalments without circumstances showing a renunciation of the contract, the vendor ceases to make deliveries. *Monarch Cycle Manufacturing Co. v. Royer Wheel Co.*, 105 F. R. 324 (C. C. A., Dec. 4, 1900). Such a result, whilst it follows log-

ically from *Mersey Co. v. Naylor*, would hardly seem to be consonant with the reasoning in *Norrington v. Wright*; and as it is palpably counter to the intention of the parties to treat such a breach as breach of a mere warranty, it is to be hoped that the Supreme Court will have the question squarely before it, and it will adopt the same rule for instalments of payments as it has for instalments of goods—that time is of the essence.

## RECENT DECISIONS.

**BILLS AND NOTES—FAILURE OF CONSIDERATION—GENERAL ISSUE—EVIDENCE.** Plaintiff sold defendant a machine, warranting it. In payment defendant gave his promissory note. *Held*, in an action on the note that evidence of total failure of consideration due to a breach of the warranty was admissible under the general issue. *Keystone Mfg Co. v. Forsythe*, 85 N. W. 262 (Mich., Feb. 1901).

The court treats the breach of warranty as a breach of condition causing total want of consideration. Evidence of want of consideration was, before the Hilary rules, admissible at common law under the general issue. *Chitty on Bills of Exchange*, 8th Am. Ed., page 604; *McCreary v. Jagers*, 3 McCord, 473 (S. C. 1826). In Michigan the general issue is as broad as at common law. *Taff v. Hosmer*, 14 Mich. 309 (1866).

But where there is only a partial failure of consideration, unliquidated in amount, as in the case of goods sold on a warranty subsequently broken, evidence thereof would be no defence to an action on the note. *Fickey v. Larme*, 6 M. & W. 278 (Ex. 1840). The principal case seems to be within this rule. To-day, in this country, such evidence would be a *pro tanto* mitigation of the damages. *McKnight v. Devlin*, 52 N. Y. 402 (1873); *Stacy v. Kemp*, 97 Mass. 166 (1867).

**CARRIERS—LOSS OF BAGGAGE—LIABILITY OF COMPANY.** Without intending to become, and without becoming, a passenger, defendant bought a ticket and checked his trunk over defendant road. The night after its arrival the trunk was stolen from defendant's baggage-room. *Held*, defendant was a gratuitous bailee, liable only for gross negligence. *Marshall v. P. O. & N. Ry.*, 85 N. W. 242 (Mich. Feb., 1901).

To fix upon defendant liability as a carrier of baggage the owner must stand in the relation of a passenger to him. *Smith v. Ry.*, 44 N. H. 330 (1862); *Ry. v. Wimberley*, 75 Ga. 316 (1885); *State v. Knight*, 3 Am. & Eng. R. Cas. 374 (N. Y., 1895).

If the carrier accept by accident or mistake that which would be baggage were it accompanied by the owner as passenger, without its being so accompanied, the carrier will not be responsible for it as baggage. *The Elvira Harbeck*, 2 Blatch. 336 (U. S. C. C., 1851); *Griffan v. Ry. Co.*, 67 Me. 231 (1877).

Nor shall a carrier be held liable as a carrier of freight for that which he has accepted for carriage as baggage. *Collins v. Ry. Co.*, 10 Cush. 506 (Mass., 1852); *Beers v. Ry. Co.*, 34 At., 541 (Conn., 1896).

*Fairfax v. Ry. Co.*, 73 N. Y. 167 (1878), presents a different question. There the carrier accepted trunks, knowing that the owner was not a passenger. He was held liable as a warehouseman.

**CONSTITUTIONAL LAW—TAXATION OF NON-RESIDENT MORTGAGEES.** *Held*, a statute of Maryland fixing the *situs* of mortgages at the point where the land is located and imposing a tax on them, including those held by non-residents, does not contravene the Fourteenth Amendment. *Allen v. Bank of Camden*, 48 Atlantic 78 (Md., 1901).

The decision is perfectly sound. The U. S. Supreme Court has decided that where the tax is not levied upon the debt secured by the mortgage but upon the mortgage interest in the land, whether that interest be regarded as real estate or personal property, the tax is valid against non-residents. *Savings Society v. Multnomah County*, 169 U. S., 421 (1897); *Bristol v. Washington County*, 177 U. S., 139 (1899). The case is interesting as showing again that great injustice may result from double taxation by competing jurisdictions.



CONTRACTS—RESTRAINT OF TRADE. *Held*, a covenant not to engage in a certain business, void as in restraint of trade, will not invalidate the contract of which it is a part, if such contract has other good consideration. *Rosenbaum v. U. S. Credit System Co.*, 48 Atl. 237 (Ct. of Errors, N. J.; Jan. 1901).

With the single exception of *Fishell v. Gray*, 60 N. J. L. 5 (1897), no case seems to approach the subject from exactly this point of view. In modern times the law as to restraints on trade has grown much more lenient, and it is usual to treat such contracts as divisible wherever possible, and enforce the reasonable part of the restraint. But in the principal case there is nothing said as to divisibility, and the plaintiff's covenant is regarded as merely insufficient, *i. e.*, no consideration, as distinguished from such illegal consideration as would taint the whole transaction. This seems sensible and in accordance with the better modern opinion that, in the absence of statutes, such contracts are only unenforceable, not criminal or actionable. *Mogul S. S. Co. v. MacGregor*, 1892 App. Cases 25 (H. of L.); but cf. *Jackson v. Stanfield*, 36 N. E. 345 (Ind., 1894). On the facts the following cases appear to accord with the principal case: *Green v. Price*, 13 M. & W. 695 (1845); *Dean v. Emerson*, 102 Mass. 480 (1869); *Oregon Nav. Co. v. Winsor*, 20 Wall. 64 (1873); *West. Union Tel. Co. v. R. R. Co.*, 11 Fed. 1 (1882). *Contra*: *Bank v. King*, 44 N. Y. 87 (1870); *Arnot v. Coal Co.*, 68 N. Y. 558 (1877); *Oil Co. v. Nunne-maker*, 142 Ind. 560 (1895). See also *Eddy on Combinations* (1901), § 603*n*, 712, 713, 745.

CONTRACTS—RESTRAINT OF TRADE. *Held*, a contract not to engage in a particular business, though unaccompanied by the sale of any business, stock or plant, is not void as in restraint of trade. *Wood v. Whitehead Bros.*, 59 N. E. 357 (N. Y., Feb. 5, 1901).

In effect the plaintiff's agreement to discontinue his business was a sale of the good-will to the defendant. Such a contract was held good in *Brett v. Ebel*, 29 App. Div. 256 (1898), cited with approval in the case at bar. Apparently there is no other case in point. See *Eddy on Combinations* (1901), § 771. On principle it would appear unexceptionable.

DOMESTIC RELATIONS—WIFE'S SERVICES AND EARNINGS—EFFECT OF MODERN STATUTES. Under an agreement between plaintiff and defendant's testator, plaintiff's wife, while continuing to live with her husband, rendered services to the testator for the value of which this suit is brought. Laws of 1884, Chap. 381, provide that married women may contract as if unmarried. *Held*, the action was properly brought in the husband's name. *Holcomb v. Harris*, 166 N. Y. 257 (Mar., 1901).

In *Birkbeck v. Ackroyd*, 74 N. Y. 356 (1878), the statute of 1860, conferring upon married women the right to create a separate estate, was held not to interfere with the right of the husband to his wife's earnings in the absence of an election on the woman's part to labor for her own estate. And in *Porter v. Dunn*, 131 N. Y. 314 (1892), notwithstanding the liberal provisions of the Married Women's Act of 1884, a husband recovered money earned by his wife under a contract made by her with the defendant. The Court held that the statute had no effect on the common law right of a husband to the services and earnings of his wife where they are not rendered or received expressly upon her separate account. These decisions are the result of a strict construction of statutes modifying the common law.

EQUITY—CONCURRENT JURISDICTION—COMPLICATED ACCOUNTS. After an account, involving over eighty-eight disputed items and much technical evidence had, in an action at law, been sent to a referee, plaintiff filed a bill to take his complaint into equity and enjoin the suit at law. *Held*, equity has concurrent jurisdiction and may enjoin an action at law where the mutual accounts are complicated and the evidence is so technical that it is practically impossible for a jury to reach any just conclusion. *Inhabitants of Cranford Tp. v. Wallers*, 48 Atl. 316 (N. J., Feb., 1901).

Action by courts of equity in this class of cases is discretionary, and

no relief will be given unless a state of facts warranting interference with the trial at law is confessed in the answer or apparent on the state of the record. *Railway Co. v. Nixon*, 1 H. L. C. 111 (Eng., 1847); *Railway Co. v. Brogden*, 3 Macn. & G. 8 (Eng., 1850); *Crane v. Ely*, 37 N. J. Eq. 564 (1883). As the jurisdiction does not depend on the absence of a legal remedy, but chiefly on the fact that a jury has no means of reaching a just conclusion, *Crown Coal Co. v. Thomas*, 177 Ill. 534 (1899), in those States where, by statute, an account may be taken from the jury and sent to a referee, who may order a production of the books, equity will not interfere if the case does not involve a fiduciary relation. *Badger v. MacNamara*, 123 Mass. 117 (1877); *Marvin v. Brooks*, 94 N. Y. 71 (1883); *Ullman v. N. Y. Life Insurance Co.*, 109 N. Y. 421 (1888); *Wissner v. Fruit Jar Co.*, 25 App. Div. 362 (N. Y., 1898). The case is of interest in showing the difference of procedure in "code" States and those retaining the old equity rules.

**EVIDENCE—EXPERT TESTIMONY.** Action for injury to a workman by falling dirt. *Held*, an experienced civil engineer may answer a question as to a safe and proper method of shoring up an excavation made at the side of a high chimney. *Finn v. Cassidy*, 59 N. E. 311 (N. Y. 1901).

This ruling follows the trend of decisions on the admissibility of expert evidence and represents the correct principle. 1. *Greenleaf Evidence* (16th ed.), p. 441. This would follow from the admission of expert evidence in the following cases: that a house was built in a workmanlike manner, *Pullman v. Corning*, 9 N. Y. 93 (1853); proper speed for a tugboat, *Baird v. Daly*, 68 N. Y. 547 (1877); by a cabinet maker that work was a good job and well done, *Ward v. Kilpatrick*, 85 N. Y. 414 (1881); that the use of machinery weakened the walls, *Turner v. Hoar*, 21 S. W. 737 (Mo., 1893); that a staging erected for the purpose of piling wood was safely constructed, *Prendible v. Connecticut Mfg. Co.*, 35 N. E. 675 (Mass., 1893). This question has been discussed by O'BRIEN, J., in 1. COLUMBIA LAW REVIEW 180. GRAY, J., who dissents in the principal case, does not dispute the truth of the principle laid down in the prevailing opinion; he believes the danger of the place was not connected with the underpinning of the chimney and therefore its construction had nothing to do with the issue.

**EVIDENCE—LARCENY—RES GESTÆ.** Suspicion of larceny fell on the accused, and his house was searched by a constable soon after the commission of the crime; upon discovery of goods the accused stated that they had been brought and left with him by a third party. *Held*, such statements were admissible as part of the *res gestæ*. *State v. Gillespie*, 63 Pac. 742 (Kas., 1901).

Such evidence is almost universally conceded to be admissible. In general the possession of stolen goods is evidence of guilt upon which a jury might find a verdict. *Commonwealth v. Randall*, 119 Mass. 107 (1875); *People v. Stover*, 56 N. Y. 315 (1874); 1. *Greenleaf Evidence*, § 42. As it is competent for the defendant to prove acts by which the goods came into his possession, it should be competent for him to prove all pertinent statements made at the time of the discovery, spontaneously and before he had time to concoct a story. Many courts have held this evidence admissible within the *res gestæ* rule either for or against the accused. 2. *Bishop Criminal Procedure* (3d ed.) §§ 743, 745, 746, and cases there cited; *People v. Dowling*, 84 N. Y. 478 (1881); *Henderson v. The State*, 70 Ala. 23 (1881); *Territory v. Mitchell*, 54 Pac. 782 (Okl., 1898).

**INSOLVENCY—PREFERENCES—ESTATE BY ENTIRETIES.** A, knowing he was insolvent, and in order to put his property out of the reach of his creditors, conveyed it to X, without consideration, who reconveyed to A and his wife, "husband and wife, as joint tenants." A's wife had no knowledge of his insolvency, and believed that the object of the transfer was to secure a loan she had made A from her own antenuptial earnings. *Held*, this was not fraudulent against creditors, and the estate by

entireties must be protected. *Ullmann et al. v. Thomas et al.*, 85 N. W. 245 (Mich., Feb. 1901).

Since the deed expressly created a joint tenancy, it may well be doubted whether this was properly treated as an estate by entireties, incapable of partition. *Joos v. Fey*, 129 N. Y. 17 (1891); *Miner v. Brown*, 133 N. Y. 308 (1892); 4 *Kent Com.* 362, 364; *N. Y. Real Prop. Law*, § 56; *Howell's Mich. Gen. St.*, § 559. But a transfer, made by an insolvent as security for a subsisting debt, to one who has no knowledge of a contemplated general assignment, is valid against creditors. *Manning v. Beck*, 129 N. Y. 1, 10 (1891). And, unless a general assignment has been made or is contemplated, there is no limitation upon the right to prefer one creditor over the others. *Bishop, Insolvency*, §§ 172-4, 177 (1895). Adopting, then, this view of the case, the present is but an aggravated instance of the injustice which the well-settled rule permits.

**INSURANCE—BENEFIT ASSESSMENT CORPORATION—CHANGE OF BENEFICIARY.** A member of a society, whose certificate was made payable to his wife, wrote the collector to have a new one issued to his mother instead, but died before the request was communicated to the society. No peculiar form having been prescribed by the society's by-laws to govern the change of beneficiary, it was *held* that effect must be given to the member's intention, though the wife's certificate was outstanding, and the Insurance Law only provided that such change might be made *upon the consent of the society*. *Fink v. D., L. & W. Mutual Aid Society*, 57 App. Div. 507 (N. Y., Jan. 1901).

While the question here raised was not concluded by the case of *Luhrs v. Luhrs*, 123 N. Y. 367 (1890), the present holding is certainly in line with the reasoning in that decision; and the Insurance Law on the point is a re-enactment merely of the Laws of 1883, Ch. 175, § 18. The numerous decisions cited are unsatisfactory, because the by-laws of each society have respectively furnished the test, but they serve to make clear at least the desire of the courts to effectuate the member's intention. *Richards, Insurance*, 198. Yet the present court has gone very far, in holding the change properly made, when, as LAUGHLIN, J., says (dissenting), at the time of the member's death the old certificate had not been revoked, nor superseded by a new one, and the society had not consented to the change.

**INSURANCE—INTERPRETATION OF STATUTE EXEMPTING FROM EXECUTION.** Defendant had received money as the beneficiary of a fraternal society, and had loaned it to his son, taking a bond and mortgage therefor. Upon these the plaintiff levied under an attachment. The defendant claimed exemption under p. 228 of the Insurance Law (Chap. 690, Laws of 1892). *Held*, the statute exempting from execution "all money or other benefit \* \* \* to be paid" did not cover an amount already paid to the defendant. *Bull v. Case*, 59 N. E. 301 (N. Y., Feb., 1901). This interpretation of the statute is in line with what seems to have been the legislative intent. Chapter 175 of the Laws of 1883 provided that "money to be paid" should be exempt. *Bolt v. Kehoe*, 30 Hun. 619 (1883) *held* that money actually received by a widow was not exempt from creditors' claims. Then Chap. 116, Laws of 1884, was passed, and Sec. 116 extended the exemption to cover such a case by providing that such beneficiary fund "paid to the widow" should be exempt. The sections in point of the laws of 1889 and 1892 reaffirmed the corresponding section of the law of 1883 with certain additions, again using the words "to be paid," under which *Bolt v. Kehoe, supra*, was decided. When, therefore, the Legislature wished to extend the rule of that case, it did so explicitly, by using the form "paid." *Clark v. Lynch*, 31 N. Y. Supp. 1038 (1894) was decided on the authority of the statute of 1884, a widow being the party, and is not necessarily in conflict with the principal case.

**INSURANCE—VENDOR A TRUSTEE OF INSURANCE MONEY FOR VENDEE—CHANGE OF INTEREST UNDER ALIENATION CLAUSE OF STANDARD POLICY.** Owner of insured real estate contracted to sell, but premises were

destroyed by fire before the time fixed for completion. Full purchase price was subsequently paid, without prejudice to the rights of vendor or vendee to insurance, the vendor remaining in possession throughout. Certain insurance companies were about to pay vendor; others raised the point that under the clause, "if any change take place in the interest, title or possession of the insured," etc., the policy was forfeited. Bill in Equity filed by vendee. *Held*, first, there had been a forfeiture; secondly, as to companies waiving forfeiture, that vendor was a trustee of insurance money for vendee. *Skinner v. Houghton*, 48 Atl. 85 (Maryland, Dec. 1900). SEE NOTES.

JUDGMENTS—MORTGAGES—PRIORITIES. *Held*, a judgment creditor, A, who, upon issuing execution against the lands of his debtor, directed the sheriff to return it without levying, and upon it instituted supplemental proceedings to reach assets not leviable, was postponed, not only to a subsequent judgment creditor, C, who did levy, but also to an intervening mortgagee, B, who, if C had not levied, could not have taken advantage of A's laches, but who, notwithstanding C's action, still remained prior to C. *Andrus v. Burke*, 48 Atl. 228 (N. J. Eq., Feb. 1901).

The court based its decision on *Clement v. Kaighn*, 15 N. J. Eq. (1862) and *Hoag v. Sayre*, 33 N. J. Eq. 552 (1881), which it considered binding, but frankly admitted that it knew of no principle to support it. The court assumed that if C had not issued execution and levied, B should still remain subsequent to A. Upon this assumption the conclusion arrived at does indeed present a "legal puzzle \* \* \* insoluble on any known principles." But it is submitted that this assumption is wrong, and that the conclusion is right on principle. For, as a matter of law and of justice, A's laches should inure to the benefit of B as well as of C. That the Legislature failed to provide for this is not a valid reason why the court should refuse to bring about the desired result in a case like the present, where otherwise B might suffer from the priority which, apparently, through legislative inadvertence, was given to C alone. Where this position is not adopted, the courts are driven to other expedients to support the rights of the mortgagee. *Hunt v. Bowman*, 63 Pac. 747 (Kan., 1901).

LICENSE FEES—WHAT CONSTITUTES A PUBLIC HACKMAN. *Held*, a non-resident liveryman who furnished cab service to the patrons of a steamship company, under contract with the company, was not a public hackman within the meaning of a municipal ordinance and not required to secure a license. *City of New York v. Hexamer*, N. Y. Law Jour., Mch. 25, 1901.

It is well settled that when a charge exceeds the cost of issuing the license and of regulating the business, it is a tax and not a fee. In this case regulation was unnecessary, because defendant kept no stands and his services were offered to a limited class under contract. With regard to defendant, the charge was therefore a tax, and as there was no intention that this municipal power should be used to raise revenue, the defendant was clearly not liable. *People v. Jarvis*, 19 App. Div. 466 (1897).

QUASI-CONTRACT—PLAINTIFF IN DEFAULT UNDER CONTRACT. *Held*, a plaintiff in default under a building contract could recover the actual value to the defendant of what has been done, and plaintiff must prove the amount of defendant's enrichment. *Gillis v. Cobe*, 59 N. E. 455 (Mass., 1901), 3 dissenting.

In *Hayward v. Leonard*, 7 Pick. 181 (1828), it was *held*, upon similar facts, that "what the house was worth to the defendant" was an erroneous basis of recovery, and the true rule was "to deduct so much from the contract price, as the house was worth less on account of these deviations." In *Atkins v. Barnstable*, 97 Mass. 428 (1867), a *quantum meruit* not to exceed the contract price, less defendant's damage, was the basis of recovery. The difference between the two rules has been pointed out. *Keener's Quasi-Contracts*, 313 N. 2. The prin-

principal case held that there was no question of recoupment and eliminated the contract price, yet *Hayward v. Leonard* was approved.

In a still more recent case in Mass. it was *held* that while the true basis was defendant's actual enrichment, yet in many cases this could be ascertained by deducting defendant's damages from the contract price, yet *Gillis v. Cobe* was approved. *Norwood v. Lathrop*, 59 N. E. 650 (Mass., 1901). There is a difference between these three rules, though they seem to have been confused. It is conceived that the rule in *Atkins v. Barnstable* is the most reasonable, and it has been adopted elsewhere. *Eyerman v. Cemetery Ass'n.*, 61 Mo. 489 (1876); *Miller v. Gillick*, 66 Mo. App. 500 (1896).

**QUASI-CONTRACT—PLAINTIFF IN DEFAULT UNDER CONTRACT.** Where a plaintiff was wilfully and inexcusably in default under a contract for work and services at a *per diem* rate, *held* he could recover for the work actually done according to the contract price, less any damage to the defendant. *Asher v. Tomlinson*, 60 S. W. 714 (Ky. 1901).

So far as appears from the report of this case, part of plaintiff's labor was bestowed on his own property, which he refused to transfer to defendant when the contract was abandoned, and on this ground he should not have recovered for the entire work done. *Dowling v. McKenney*, 124 Mass. 478 (1878). Assuming plaintiff's right to recover, the true measure of recovery was not adopted. The most reasonable basis is a *quantum meruit*, not to exceed the contract price, less defendant's damage from the breach. *Atkins v. Barnstable*, 97 Mass. 428 (1867). There is, however, good authority for the rule in the principal case. *Pinches v. Church*, 55 Conn. 183 (1887); *Ætna Works v. Kossuth County*, 79 Iowa 40 (1890). The objection to this rule is that it adheres too closely to the contract, when in fact the plaintiff, having abandoned the contract, is seeking to recover the amount of the defendant's actual enrichment. The contract price should, therefore, be eliminated, except where by *quantum meruit* plaintiff would profit by his breach, and in that case the contract price should be the limit of recovery.

**REAL PROPERTY—EASEMENTS—NEW USE OF HIGHWAY.** A telephone company dug a trench below the surface of a city street for a conduit for telephone wires, to be used by the city, public and others for inter-communication. *Held*, that this is not such a new use of the highway as will entitle the abutting owner of the fee of the highway to compensation. *Coburn v. New Telephone Co.*, 59 N. E. 324 (Ind., Feb., 1901).

The Court follows *Magee v. Overshimer*, 150 Ind. 127 (Mar., 1898). It is well settled that a highway may be used, without compensation to the owner of the fee, for purposes which could not have been contemplated at the time of its dedication. *Eichels v. Evansville Street Railway Co.*, 78 Ind. 261 (1881); *Lockhart v. Craig Street Railway Co.*, 139 Penn. 419 (1891); provided such new use tends to facilitate the use of the land by the public for highway purposes.

As to what are proper highway uses, the decisions are numerous and not altogether harmonious. In general the courts tend to favor such new uses as are beneficial either to the residents, as drains, *Stowdinger v. Newark*, 28 N. J. Eq. 137 (1877); gaspipes, *Commonwealth v. Lowell Gas Co.*, 12 Allen 75 (1866), etc.; or to the public passing and repassing, as street railways, *Craig v. Rochester Railroad Co.*, 39 N. Y. 404 (1868). But this doctrine is not extended to uses intended entirely or primarily to connected distant points, without special benefit to persons living upon or using the highway, as steam railroads, *Williams v. New York Central*, 16 N. Y. 97 (1857); or telegraph lines, *Dusenburys v. Mutual Telegraph Co.*, 11 Abb. New Cas. 440 (1882); but see *contra*, *Pierce v. Brew*, 136 Mass. 75 (1883). Telephones occupy the middle ground between these two classes of uses, and with regard to them the authorities are divided. The principal case, however, follows the general trend of the decisions.

**REAL PROPERTY—EASEMENTS—HIGHWAYS AND RAILROADS.** A railroad company owning its right of way in fee by conveyance from plaintiff's

grantor was compelled by a municipal ordinance to elevate its tracks. The plaintiff, an abutting owner, sued because of the consequent injury to his property. *Held*, he could not recover, a railroad not being a highway in the sense that an adjoining owner has easements of light and air therein. *Kots v. Illinois Central R. R.*, 59 N. E. 240 (Ill., Dec., 1900).

In some jurisdictions abutting owners who have granted the fee of the highway to the public authorities are held to have certain rights of light and air therein as easements of necessity reserved by implication for the benefit of their adjoining property. And when the enjoyment of these rights is interfered with by a user of the highway inconsistent with the purpose of its dedication, the owners may obtain relief. *Story v. Elev. R. R. Co.*, 90 N. Y. 122 (1882).

This doctrine would seem to be equally applicable in the case of land granted for other public purposes. In *Barnett v. Johnson*, 15 N. J. Eq. 48 (1856), the proprietors of a public canal were restrained from cutting off light and air from adjoining property by the erection of buildings over the waterway. While the rule laid down in the principal case seems to be incorrect, the decision may perhaps be supported on the ground that the elevation of the tracks was a user of the right of way fairly within the terms of the original grant for railroad purposes.

**REAL PROPERTY—TENANT'S POSSESSION AS NOTICE.** F conveyed to B upon a secret trust for himself (F), leaving one C in possession as his tenant. *Held*, C's possession was notice to B's judgment creditors of F's equitable title. *A. R. Beck Lumber Co. et al. v. Rupp et al.*, 59 N. E. 429 (Ill., Dec. 1900).

This holding is amply justified by a series of Illinois cases cited, and which there is latterly a tendency to limit the doctrine of construction notice; *English & Scottish, etc. Co., v. Brunton* (1892), 2 Q. B. 700, 708; *Carr v. Maltby*, 59 N. E. 291 (N. Y., 1901); 2 Wh. & Tu. Eq. Cas. 200 (7th ed., 1897); *Wade, Notice*, §§ 281, 297; and in some jurisdictions the doctrine never met with favor; as applied to a tenant's possession; *Emmons v. Murray*, 16 N. H. 385, 398 (1844); there is good authority in this country for the view of the principal case. *Crosland v. Mutual Saving Fund*, 121 Pa. St. 65, 83 (1888); *Phelan v. Brady*, 119 N. Y. 587 (1890); *Anderson v. Blood*, 152 N. Y. 285, 293 (1897); *Marden v. Dorothy*, 160 N. Y. 39, 52 (1899).

**SALES—CONDITIONAL SALE—INNOCENT PURCHASER FOR VALUE—ESTOPPEL.** Plaintiff made a sale of standing timber to a lumber company, reserving title until price was paid. Plaintiff knew that the company was engaged in manufacturing lumber for the purpose of resale, but took no precautions to see that it was kept apart and tacitly allowed the company to mark it with its own mark. Before payment was made the logs were sold to an innocent purchaser for value. *Held*, plaintiff estopped to assert his title. *Miss. River Logging Co. v. Miller*, 85 N. W. 193 (Wis., Jan. 1901).

The decision is correct. At common law conditional sales accompanied by delivery of possession to the vendee are valid, in the absence of fraud, against innocent purchasers as well as against the immediate parties. *Harkness v. Russell*, 118 U. S. 663 (1886). But where the vendor clothes the vendee with the *indicia* of ownership and expressly or impliedly gives him authority to resell, he will be estopped to assert his title against an innocent purchaser for value. *Fitzgerald v. Fuller*, 19 Hun 180 (1879); *Rogers v. Whitehouse*, 73 Me. 220 (1880); *Wagon Co. v. Carman*, 109 Ind. 31 (1886); *Spooner v. Cummings*, 151 Mass. 313 (1890); *Columbus Buggy Co. v. Turley*, 73 Miss. 529 (1896); *Mayer v. Catron*, 48 S. W. 255 (Tenn., 1898). The principal case falls within the latter doctrine. At present the common law view, that a conditional vendee's possession of the property does not confer upon him apparent authority to sell either as owner or agent of the owner, has been modified by statutes affording relief to creditors of the vendee and innocent purchasers from him for value. 1 *Stimson's Am. Statute Law*, §§ 4550-

4555. For the New York provisions see 3 *N. Y. R. S.* (9th ed.), Laws of 1884, Ch. 315, as amended.

**SALES—INSTALMENT CONTRACT—EFFECT OF FAILURE TO PAY INSTALMENT OF PURCHASE PRICE.** *Held*, a failure by the vendee to pay an instalment of the purchase-price, unless an intention to repudiate the contract be shown, is no ground for a refusal by the vendor to deliver subsequent instalments of goods, and he will be liable in damages for non-delivery. *Monarch Cycle Manufacturing Co. v. Royer Wheel Co.*, 105 F. R. 324 (C. C. A., Dec. 4, 1900). SEE NOTES.

**STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.** *Held*, payment of purchase money or performance of services equivalent thereto was not sufficient part performance of an oral agreement for the sale of lands to take case out of § 4 of Statute of Frauds and allow decree for specific performance. *PARKER, C. J., HAIGHT and LANDON, J. J.*, dissenting. *Russell v. Briggs*, 59 N. E. 303 (N. Y., Feb. 5, 1901).

The case is interesting for a remarkably strong dissent from established doctrine, and treated by the minority as a case of first impression. It is well settled that such a contract is void, though no price be paid in money (*Browne, Statute of Frauds*, § 271), and that payment even of the whole consideration is not sufficient part performance *Idem*, § 461. The point was considered in *Odell v. Montross*, 68 N. Y. 499 (1877), and *Cooley v. Loddell*, 153 N. Y. 596 (1897), *semble accord*. The principal case is a square application of the general rule, on the usual ground that nothing is part performance which does not expose party performing it to fraud if the contract is not performed, and that here the parties may be restored to their original position by an action to recover the money. On principle, as pointed out by the minority, such fraud exists whenever the vendor is insolvent; and equity has gone even further in those cases where bare possession without payment by a vendee who is thus, if anything, benefited, has been held sufficient part performance. But the principal case is not necessarily authoritative where services are of such peculiar nature that it is impossible to estimate their pecuniary value to recipient. *Rhodes v. Rhodes*, 3 Sandf. Chan. 279 (N. Y., 1846); *Malins v. Brown*, 4 N. Y. 403 (1850); *Browne, Statutes of Frauds*, § 463.

**STATUTES—REGULATION OF PUBLIC CALLINGS—TELEPHONES.** Plaintiff was indebted to the defendant for telephone service. He refused to pay, alleging that the company was in his debt. *Held*, the company was justified in discontinuing the service, notwithstanding his claim against them. *Rushville Co-Op. Tel. Co. v. Irwin*, 59 N. E. 327 (Ind., Jan. 1901.)

The statute of Indiana imposes a penalty on telephone companies which refuse to supply all applicants without discrimination, provided such applicants comply with all reasonable regulations of the company. The defendant had a rule that any delinquent subscriber should be cut off. The case turns upon the reasonableness of this rule. It is well settled that corporations charged with a public duty may make and enforce such a regulation for the efficient prosecution of their business. *Western Union v. McGuire*, 104 Ind. 130 (1885) and cases there cited. But this right is limited to current indebtedness, and if waived cannot be exercised after service has been resumed, to enforce payment of the original debt. *Wood v. City of Auburn*, 87 Me. 287 (1895). The principal case extends this doctrine by affirming the right to cut off a subscriber who claims that the company is his debtor on another transaction, and distinguishes it from *Webster v. Telephone Co.*, 17 Neb. 126 (1885), where the subscriber refused to pay on the ground that the service had been imperfect.

**TORTS—MENTAL SUFFERING—TELEGRAPH CASES.** On account of the failure of defendant telegraph company to deliver a message announcing the death of a near relative, plaintiff was unable to be present at the funeral. He sued to recover damages in tort for distress of mind caused by the company's negligence. Demurrer to the complaint sustained. *Ferguson v. Western Union Tel. Co.*, 59 N. E. 416 (Ind., Feb. 1901).

This decision is worthy of note in that it marks a return to the common law doctrine of damages in a jurisdiction where since 1889 a different rule has been applied in cases of this kind. *Reese v. Tel. Co.*, 123 Ind. 294 (1889). The novel doctrine allowing damages for mental anguish caused by failure to deliver telegrams was first announced in Texas twenty years ago. *So Relle v. Western Union Co.*, 55 Tex. 308 (1881). And this ruling has been adopted in at least six other States, viz.: Alabama, North Carolina, Kentucky, Tennessee, Iowa and Indiana. At common law mental suffering is an element of damages only when connected with physical injury, but it would seem no more difficult to estimate damages when the distress of mind is unaccompanied by bodily hurt. That the rule introduced by judicial legislation is unwise as a matter of public policy is shown by the flood of speculative litigation in those States where the doctrine has found favor.

**TRUSTS—BREACH OF TRUST—REMEDIES—RATIFICATION.** A *cestui que trust* obtained judgment against his trustee for the proceeds of trust property wrongfully sold by him. This judgment remaining unsatisfied, the *cestui* sought to follow the property into the hands of purchasers. *Held*, that by taking judgment plaintiff ratified the sale and waived his right to pursue the vendees. *Carter v. Gibson*, 85 N. W. 45 (Neb., Jan. 1900).

A defrauded *cestui* may follow the trust property or may rely on a personal claim against the trustee at his option. *Murray v. Lylburn*, 2 Johns. Ch. 441 (N. Y., 1817). But the right of election must be exercised within a reasonable time after knowledge of the breach of trust. *Breit v. Yeaton*, 101 Ill. 242 (1882). The right to claim the property and the right to hold the trustee being alternative and not concurrent, the *cestui* after having taken judgment cannot be allowed to insist on repugnant rights. *Hodges v. Bullock*, 15 R. I. 592 (1887).

**WILLS—CONSTRUCTION—PRECATORY TRUSTS.** A will drawn by testator, a layman, left all his property to his widow as executrix and trustee, "in trust for my infant son," "to provide for the care and maintenance and education of my son," and "to assign to him \* \* \* such sum \* \* \* as in her judgment may be of help to him in starting \* \* \* his profession, and at the same time within the limits of her ability to relinquish from her estate." \* \* \* *Held*, the widow trustee had a beneficial interest in the estate; that the testator made an absolute gift to her, simply "trusting" that she would carry out his expressed wishes. *Davies v. Davies*, 85 N. W. 201 (Mis., Feb., 1901).

"The result reached carries the doctrine of construction to a considerable length" (p. 203), but seems sound. It prevented partial intestacy; made provision for a wife with whom testator, a layman, was on the best of terms; and varied the literal meaning of "in trust" by considering the words "her estate" and other clauses in the will inconsistent with a strict legal construction of the words "in trust."

**WILLS—CONTRACT TO MAKE A PARTICULAR WILL—SUIT BY BENEFICIARY—PART PERFORMANCE UNDER THE STATUTE OF FRAUDS.** Plaintiffs sue the executors of A, their aunt, alleging that testatrix contracted to leave all her property to the plaintiffs. The contract proved was made orally with B and C, sisters of A. By its terms each of the three sisters was to leave all her property to the others, or if only one survived her, to that one. The last one to die was to make plaintiffs her heirs. B and C died, performing their part of the contract. A never made a will in favor of plaintiffs. *Held*, (HATCH and O'BRIEN, J.J., dissenting): (1) plaintiffs could not sue as beneficiaries; (2) contract was unenforceable owing to statute of frauds; (3) the statute relating to wills barred the action. *Everdell et al. v. Hill et al.*, 68 N. Y. Supp. (App. Div.) 719; Feb., 1901.

(1) The court refused to extend the doctrine of *Lawrence v. Fox*, 20 N. Y. 268 (1859), to a case where obligee of the contract was under no obligation to the beneficiary. In *Buchanan v. Tilden*, 158 N. Y. 109 (1909), the obligation was that of a husband to his wife. In *Healy v. Healy*, 55 App. Div. 315 (Nov., 1900), it was that of a father to his adopted



child. In both cases beneficiary recovered. *HATCH* and *O'BRIEN*, JJ., maintained that the narrow rule of *Lawrence v. Fox* does not restrict a court of equity, citing *GRAY*, J., in *Edson v. Parsons*, 155 N. Y., 555, 565 (1898), who clearly supports them. See also *Barrow v. Richard*, 8 Paige 351 (1840). (2) The majority of the court were right in saying there was here no sufficient part performance to permit the specific performance of the oral contract against A's estate in favor of the representatives of B and C had they sued. Motives of love and affection could explain the wills of B and C. No reference to a contract was necessary. See *Hale v. Hale*, 90 Va., 728 (1894). In *Parsell v. Stryker*, 41 N. Y. 480 (1869), possession of land was given; in *Healy v. Healy*, *supra*, a mother parted with her child. In both cases plaintiff recovered. [The last case is opposed to *Shahan v. Swan*, 48 Ohio St. 25 (1891), which seems preferable on principle.] (3) On the point that the statute relating to wills barred this action for specific performance, we are unable to concur with *INGRAHAM*, J. He seems to think that if A had once duly executed a will in favor of plaintiffs, according to the contract, plaintiffs could then have sued to prevent its revocation. The jurisdiction of equity in these cases is not to prevent revocation of a prior will and bring it to probate, it being duly executed under the statute as to wills, but to impress a trust on property actually bequeathed in breach of contract. *Bigelow on Wills* (Stud. Ser.), p. 110. In *Johnson v. Hubbell*, 2 Stock. Ch. 332 (N. J., 1855), 66 Am. Dec. 773 and note, there was no prior will. Since *Parsell v. Stryker*, *supra*, and *Shakespeare v. Markham*, 10 Hun, 311, 322 (1877), it seemed settled that only the statute of frauds need be complied with in cases of contracts to make a particular will. A prior will is of importance only as satisfying the statute of frauds *Brinker v. Brinker*, 7 Barr. 53 (Pa., 1847); 3 *Pars. Contr.* 406, n.; *contra*, *Hale v. Hale*, *supra*; *cf.* *Humphreys v. Green*, L. R. 10 Q. B. D. 148 (1882), where the existence of the contract is clearly made out by other evidence. *Rowan's Appeal*, 25 Penn. St. 292 (1855) *Edson v. Parsons*, *supra*, *semble*.

## BOOK REVIEWS.

THE LAW OF COMBINATIONS. By Arthur J. Eddy. Chicago: Callaghan & Co. 1901. 2 Vols., pp. 1,540.

This is an eminently sane and cloud-dispelling book. Its author is a Chicago lawyer in active and successful practice.

"Combination as an economic factor in the industrial and commercial world" presents a theme which no lawyer can neglect. In these volumes we have an adequate and satisfactory analysis of the several subjects collaterally or directly involved in the general topic, with a calm statement of conclusions arrived at by the application of legal principles, as well as an equally dispassionate consideration of results that have been reached by the failure to apply established legal rules and by substituting therefor the rant of politicians and the ignorance of agitators. Every English and American judicial decision that bears upon the points under consideration has been cited. All important decisions are stated and reviewed in the text, the precise language used being at the same time given in extensive footnotes. The statute law of every State is presented. The Federal Anti-Trust Act is thoroughly discussed. The labor and learning exhibited are phenomenal and the results are worthy.

The first subject historically dealt with is "Monopolies," and the course of events is made clear. Although large concerns are often termed monopolistic, and there seems to be no limit to the prejudice implied in the charge, nevertheless, at the present time, there are, in fact, no monopolies except such as have been established by laws which there is no disposition to repeal, such as patents, copyrights and certain quasi-public grants.

Under "Controlling the Market," Regrating, Forestalling and Engrossing are explained with precision, and the inability of repressive statutes to control commercial requirements is clearly developed.

The law applicable to "Corners" is next examined; and Stock Exchange transactions are treated in the light of the cases respecting "Combinations," "Futures" and so-called "Gambling Contracts." This chapter contains the authorities that govern brokerage transactions upon Boards of Trade.

In Part III the author reaches his principal subject, "Combinations and Conspiracies." Combinations are not inherently illegal. On the contrary, "the law recognizes the economic truth that the co-operation of individuals is essential to the well-being and the progress of society." The formation of partnerships and of corporations is provided for and encouraged by the law. The consolidation of partnerships and of corporations is permitted. The legality of a combination is not to be measured by its magnitude. So

far as the fact of combination is concerned, a partnership and a corporation are substantially the same thing.

The usual reason given for the existing preference for the corporate rather than the partnership form in industrial organizations is the limited liability of stockholders, but that is only one of several reasons and is often of little importance. Other reasons are found in the continuity of corporate existence, which does not dissolve upon a member's death; the flexibility and accuracy in handling individual interests; and the opening of the door to the membership of large numbers of individuals, all fully protected in every right, and each having an easy and prompt method of disposing of his holdings.

While Mr. Eddy recognizes the fact that judicial decisions cannot be reconciled, he concludes that a combination is not illegal at the common law unless its purpose is immoral, unlawful or oppressive. Statutory provisions, however, have very little relation to general principles.

In this connection he rehearses the various cases in which combinations of manufacturers and others have been held to be legal, although their object was the avoidance of excessive competition. This line of decisions, ending with the *Mogul Steamship Company* case,<sup>1</sup> is worthy of consideration by many who are apt to forget that such is the law, and that statutes have been enacted to overcome the common law rights thus established.

Illegal combinations are those which are either (a) conspiracies or (b) contrary to statute. This proposition opens a discussion of the law governing Conspiracies which is exceedingly adequate and complete. While combinations are condemned by the common law if conspiracy is proved, the application of this rule by the courts has not been consistent. A marked differentiation is found in respect to the treatment accorded to labor and to capital, which have never stood upon a plane of equality before the courts, though manifestly subject to the same legal principles. The law now is that combinations to raise wages are legal, while combinations to raise prices are not legal. The author does not overlook the curious fact that a feeling of sympathy is now apparent between the large labor organizations and the large industrial combinations. This feeling is logical and natural and is clearly explained.

"Combinations of Labor in England" is the subject of a very interesting chapter, followed by another on "Combinations of Labor in the United States." Such combinations are unlawful if they amount to conspiracies in which the methods or objects are unlawful or oppressive. Recent cases are fully stated which have restrained such conspiracies when they interfered with interstate commerce, the transportation of mails or the rights of others to labor. This subject is so fully treated that no additional library is necessary for the guidance of the practitioner. Especially interesting is the full examination given to the very recent case of *Allen v. Flood*,<sup>2</sup> in

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<sup>1</sup> (1892), A. C. 25.

<sup>2</sup> (1898) A. C. 1.

which the House of Lords in England, overruling the common law judges in the lower courts, including those called in for special advice in this very case, decided that a workman could not recover damages against a walking delegate who had caused him to be deprived of employment. Labor unions, strikes, picketing and boycotts are all thoroughly sifted, and the conclusion derived from the authorities is that labor has the right to combine (1) to raise the price of labor, (2) to limit the quantity of labor, (3) to strike, if peaceful and orderly methods are employed, and (4) to establish and dictate terms and conditions of work if threats and coercion be not employed.

Attention is called to the deprecatory and half-apologetic tone frequently used by courts and always by legislatures in dealing with excesses and conspiracies on the part of labor, as contrasted with the stern attitude of indignant virtue assumed in considering errors of precisely the same character and illegality when committed by capital.

In dealing with "Combinations of Capital" it is shown that the true test of legality is the same as with labor, namely, whether or not the combination amounts to a conspiracy; but the rule usually applied by the courts is totally different, namely, whether or not the combination tends to create a monopoly or to restrain trade. A tendency is more a matter of opinion than of fact. We can determine whether a given combination does in fact stifle competition or produce a monopoly, but to say that it tends so to do practically admits that in fact it does not. These decisions which arbitrarily dispose of valuable properties on account of alleged tendencies are correctly termed "pernicious."

Nevertheless, such is the modern trend of adjudged cases, the arguments of which are transferred to our author's pages. Consideration of the results thus accomplished naturally leads to an historical examination of the struggle that has occupied public attention during the last ten or fifteen years. Capital first organized what the author calls "Simple Combinations," formed by voluntary association among competitors for the advancement of their mutual interests. While no illegal element could be fairly perceived in these arrangements and their necessity was often obvious if independent ownership was to be preserved, nevertheless the courts did not hesitate to ride them down and legislatures acted even more summarily than the courts. It was enough to say of such a compact that it tended to increase prices or to prevent competition and was therefore opposed to public policy—a dangerous phrase because not susceptible of definition.

Thus placed under the ban of the law, capital sought for methods of accomplishing the same result which would not be held illegal, and next hit upon the "Trust." Under this plan each stockholder deposited his stock with trustees, who issued their own certificates against the stock surrendered and handled the constituent corporations in the common interest of all. This method was found objectionable in practice for various reasons arising under the

laws governing corporations, and was also denounced by the courts. It was therefore abandoned and is now obsolete. The author cites an interesting paper by the late Theodore W. Dwight, in which these significant words were employed: "Let us therefore be calm. Trusts as a rule are not dangerous; they cannot overcome the law of demand and supply, nor the resistless power of unlimited competition. The right of association is the child of freedom of trade. If association is prevented by law, different manufactories may be melted into one."

And precisely this result ensued. Corporate combinations were evolved in which the titles of individual firms and corporations were "melted into one," and thus instead of a mere tendency to restrict competition, a total extinguishment was accomplished so far as the combining parties were concerned; while, at the same time, all laws were obeyed and each party kept within his right of contract derived from a source even higher than the Constitution itself. This was the logical outcome of the decisions against simple corporations and trusts. "The right of individuals to form corporations and to sell to corporations their various plants and properties is too widely recognized to be questioned at this day." Legislatures are still casting about for methods to curb the operations of corporate combinations. Some States they are forbidden to enter. Other States refuse to enforce contract obligations in their favor. Generally speaking they are a success. Without special legislation the courts have not succeeded in finding any theory for their suppression. As Mr. Eddy well says:

"Combination is a condition of economic progress. Courts and legislatures may check and embarrass it, but neither courts nor legislatures can prevent what is essential to the progress of the community. Law is effectual only in so far as it is in harmony with the natural tendency and condition of things; it is ineffectual in so far as it runs counter to the laws of economics and evolution.

"There is nothing inherently evil in a combination, the object of which is to raise wages or prices or restrict competition or control production, each of these several objects being recognized by all men as not only lawful but, economically speaking, laudable in the ordinary pursuits and occupations of life.

"If, as seems unquestionably true, the economic conditions and tendencies of the day demand co-operation and combination on a large scale, all opposing statutes and all opposing decrees and judgments will prove futile for good and prolific of mischief."

It will be difficult to find elsewhere a better historical analysis of the law respecting Contracts in Restraint of Trade than is given in the second volume of Mr. Eddy's work. As usual he begins at the very beginning and traces the development of the law step by step. In this case also the definitions and principles of the common law have been wrested from their moorings to the deception of many. Contracts in restraint of trade were necessary in order to enable citizens to sell and convey the good-will attached to successful business enterprises. This is a valuable though intangible asset which the owner has a right to dispose of for the highest price attainable. He cannot do this unless at the same time he can assure the purchaser that he will not himself embark in the same business

within the territory covered by the sale. This contract "in restraint of trade" at first was not supported by the courts. Afterwards the rule was greatly changed in accordance with the requirements of commercial necessity, and such contracts are now sustained if not broader than the principal transaction demands.

But the phrase "Contract in Restraint of Trade" sounds well in the mouth of the orator and was understood to mean something inherently bad. It was, therefore, employed in statutes as a denunciatory phrase, and has been used by legislatures and judges who ought to know better as meaning a contract in restraint of competition. A hopeless confusion has thus arisen. There is no logical connection between contracts in restraint of trade as defined in the cases and combinations in restraint of competition.

This confusion was worse confounded in 1890 by the appearance in the Federal Statutes of what is known as the Anti-Trust Law, which in its first sentence declares illegal "every contract \* \* \* in restraint of trade or commerce among the several States or with foreign nations." This statute derives its constitutional warrant solely from the interstate commerce section of the Constitution of the United States. The struggles of the Supreme Court to so interpret it that it would mean something and yet would not do too much harm, are narrated by the author with accuracy and detail. The result of these cases, in which the Court has uniformly divided four to five, has been among other things the ruling that the act, being universal in its terms, must necessarily apply to all contracts in restraint of competition, even though valuable in themselves; while contracts in restraint of trade, as previously construed, appear to be still lawful and commendable.

The book has been carefully prepared, and is handsomely printed. The frequent insertion of dates is especially commendable. Messrs. Callaghan & Company are to be congratulated upon the production of a work which will for many years be authoritative, and which no lawyer whose business leads him into the domain of corporate rights and liabilities can afford to do without.

A TREATISE ON THE LAW OF SURETYSHIP AND GUARANTY. By Darius H. Pingrey, LL.D. Albany, N. Y.: Matthew Bender. 1901. p. xvi., 443.

Possibly this is the sort of literary production which the afflicted patriarch had in mind, when he uttered his famous exclamation, "Oh! \* \* \* that mine adversary had written a book." Certainly, it is one that delivers the author, bound hand and foot, into the power of a hostile critic. It is fit to sour the milk of human kindness in the sweetest breast, and to transform the gentlest critic into a savage "Scotch Reviewer." The author is not our adversary, and we entered upon the examination of his work in the friendliest mood; but, as we plodded from page to page, in the dogged attempt to get at his meaning, and to keep awake, it required a patience greater even than Job's to retain our habitual serenity of temper, and refrain from becoming *his* ad-

versary. If we know our own heart, however, it is still serene, and what we are about to say will be uttered more in sorrow than in anger. Indeed, a second reading of the very modest and taking preface, following as that rereading did an examination of the body of the work, came near to stifling our sense of duty and to softening our moral backbone into a chocolate éclair. But the kindest-hearted critic is bound to regard his obligation to the reading public carefully, and to discharge it conscientiously, however much he may disappoint the hopes of author and publisher.

It is only fair to say, that the opinions which we have formed of this book are quite different from those which the enterprising publisher has been disseminating, in the form of quotations from letters written by distinguished lawyers. Some of the letters disclose the fact, however, that they are acknowledgments of gratuitous copies of the lauded book. It is an old saying that one should not look a gift horse in the mouth. Evidently the writers of some of these epistles have heeded the proverb. Their statements are to be accounted conventionalities, which have cost little labor and possess little value. They are the smooth phrases of good-natured men, who appear to us ready to swap a puff for a book. If these men went beyond a cursory glance at the substantial binding, the good paper and the clear type of this book, it is difficult to understand how they are able to praise it. Had they essayed the task of reading it carefully, they would have been compelled to admit that they had never examined a book, even a law book, which was written in a more wretched style. Here are a few specimen sentences:

"Whether a surety's liability is a debt is a question not answered the same" (p. 5). "A surety has the right to determine for himself on what condition he will become surety and to fix the nature of his liability as between himself and the prior maker; and by agreement between him and said principal, the liability of said subsequent signer may be made that of all sureties for all the makers who have signed before him" (p. 7). "The contract of indorser is primary and that of transfer; a guaranty is that of a security; a guarantor is held to a stricter measure of responsibility" (p. 242). "One line of decisions hold that a guaranty of the collection of a note, that it is not necessary for the holder to try collection by legal proceedings, provided it would be of no avail" (p. 265).

But the defects of this book are not confined to its style. It abounds in conflicting statements which the author does not attempt to harmonize or explain, and it cites in support of propositions cases which lend to them no countenance whatever. For example, the author declares, on page 264, that some cases hold that a "guaranty under seal is negotiable," and cites cases from Alabama, Illinois, Missouri, New York and Wisconsin to sustain his assertion. In not one of them can be found a suggestion that a guaranty under seal is negotiable. In short, the author's hope, expressed in the preface, that "definitions have been formulated and principles stated with perspicuity and accuracy" has not been realized. Neither accuracy nor perspicuity characterizes this work.

THE LAW AND POLICY OF ANNEXATION—WITH SPECIAL REFERENCE TO THE PHILIPPINES, TOGETHER WITH OBSERVATIONS ON THE STATUS

OF CUBA. By Carman F. Randolph. New York: Longmans, Green & Co. 1901. pp. xi, 256.

It is a curious fact that nearly every writer who has undertaken to discuss the constitutional questions growing out of the recent territorial expansion of the United States has seemed to feel compelled to hold, either that all the provisions of the Constitution, which could by any possibility be applicable, operate to limit the action of the United States Government in the newly acquired territory, or that none of them do, and that the government has, therefore, a free hand to do what it will. That one may, for example, hold that the so-called "Bill of Rights" limits the action of the Government in a territory, and at the same time believe that that territory is not a part of the "United States" within the meaning of the term as used in the clause requiring uniformity of duties, does not seem to present itself as a possibility to the minds of most persons. The present work is no exception to this general rule, and it is perhaps for that reason that, in spite of its comparative moderation of tone, it leaves an impression upon the reader of having been written by one having a brief against the present administration, rather than by one intent upon a purely scientific exposition of the law governing the subject.

The plan of the book includes a discussion of both the questions of law and the questions of policy involved in the annexation of the Philippines. With reference to the latter, Mr. Randolph urges a withdrawal of the United States from the Philippine Islands as a sovereign power, and suggests as the method of its accomplishment a protectorate along lines which he lays down. A discussion of the advisability or feasibility of this the scope of this review forbids. We mention it in passing, however, as it is perhaps inevitable that the author's views as to policy should, perhaps unconsciously, have given color to his views on the legal aspects of the problem.

From what has already been said, it seems hardly necessary to add that Mr. Randolph takes the position that the Constitution of the United States possesses of its own force validity in the Philippines, to the extent of carrying into the islands the provisions in behalf of civil liberty, of demanding uniformity with the rest of the United States in the matter of duties, imposts and excises, and making the Filipinos born since annexation citizens of the United States. The space at our disposal prevents a critical examination of the various positions advanced and permits only of a brief summary of the most important of them. The first chapter deals with the annexation of the Philippines, discusses the Spanish title, our title under the treaty with Spain, and the legal effects of acquisition, the view taken being as above stated, that the islands have, by the ratification of the treaty, become a part of the United States so as to come under the Constitution. The second chapter discusses the question further, in the form of a reply to the arguments urged in favor of the contrary view. This chapter is among the best in the book, and shows an appreciation of the fundamental principles of the American system of constitutional government which is often conspicuous by its ab-



sence in current discussions of the subject. The third chapter deals with a variety of subjects, including questions of nationality and citizenship, political and civil rights, and foreign and domestic commerce. The views advanced are, that the Filipinos born since annexation are citizens by virtue of the Fourteenth Amendment, having been born in the United States and subject to its jurisdiction; that those born before annexation are citizens duly naturalized by the Treaty of Paris; and that the clause requiring uniformity of duties throughout the United States includes the Philippines and Porto Rico.

In the fourth chapter, under the heading "The Governing of the Philippines," the constitutional powers of the President, both before and after the treaty, and of Congress, are considered. The view is expressed that the legislative acts of the President in the Philippines since the ratification of the treaty of annexation are illegal, constituting a usurpation of the powers of the Legislature by the executive. The reasoning upon this point is perhaps as unsatisfactory as any in the book. The same may be said of the summary disposal of the recent act of Congress vesting in the President, or rather in his appointees, all power of local government in the Philippines, it being characterized, without any satisfactory reason, as "a halting measure of doubtful legality."

Chapter five deals with the alienation of the Philippines, and is occupied chiefly with the discussions of policy previously referred to. The following twenty pages are devoted to an interesting discussion of the legal problems raised in connection with the present position of Cuba. An observation, which has, owing to developments in Cuba since the book was written, lost much of its practical importance, is that which points out that, should the United States desire to annex Cuba before recognizing the establishment of an independent government, the annexation could not be accomplished by treaty, inasmuch as there would be no State with which to make a treaty.

The book is equipped with an adequate index, and contains in an appendix the text of the joint resolution of Congress, the declaration of war against Spain, the protocol and treaty of peace, and a few select documents illustrating the principles acted upon by England, France and Germany in establishing protectorates.

Taken as a whole, the book does not satisfy the expectations aroused by its title, which hardly leads on to expect so one-sided a presentation of the subject. It is, nevertheless, a valuable and interesting contribution to the literature of these much-debated questions, and should not be neglected by any one who desires to familiarize himself with the arguments upon that side of the subject which the book presents.

**REGISTERING TITLE TO LAND—A SERIES OF LECTURES DELIVERED AT YALE.** By Jacques Dumas, LL.D. Procureur de la Republique, at Rethel, France. Chicago: Callaghan & Co. 1900. p. 106.

The title of this work is somewhat misleading. The subject is of such great present interest and concerns so many sides of civic

life that the reader, on approaching the book, might well expect that the various questions involved should be at least touched upon, if they could not be exhaustively treated in a work of this compass.

One of these is the political question, Whether it is properly a State function to increase the transferability of real estate and to manage the insurance funds, which is a necessary part of every sound system of land registration.

The recent extension of the socialistic end of the State might seem to remove this from the realm of discussion ; yet in the City of New York there are two private corporations that for several years have been performing this function to general satisfaction, and at probably little greater expense to the community than would be involved in the performance thereof by the State.

Another important political question is, whether the registration of land should be made compulsory or only permissive. While it is compulsory in Australia and Germany, in England, Massachusetts, Illinois and Ohio, it is permissive, thus indicating the practical solution of the question in England and the United States.

All of these questions are ignored by the writer, as well as the financial question regarding the proper management of the insurance fund.

It is true that he informs us (p. 85) that in Tunis "a contribution of 1 per cent. of the value of the registered property is paid into the fund"; in Ontario (p. 86) one-quarter of 1 per cent., and (p. 96) shows the losses in Australia and Tasmania during the year 1899 ; but isolated facts and figures of this nature convey nothing to the student, and cannot form the basis of any conclusion.

It is evident that the questions of municipal law that will arise upon the introduction of a system which by summary process divests legal and equitable titles to real estate and transfers them to an insurance fund, and bestows upon a certificate of title the quality of negotiability, must be numerous, complicated and interesting.

So must be the questions of criminal law, where, as in Massachusetts, the withholding of certain information from an unregistered encumbrancer or attachment creditor is made penal.

So are the many questions of administrative law relating to the creation, jurisdiction and procedure of land courts ; yet only the administrative side of title registration is considered in this book, and that only in outline and without any attempt to elaborate details or to point out the distinct features of the system in various countries.

It is much to be regretted that the author ignores the registration systems of Massachusetts, Illinois and Ohio, although he discusses those of Tunis, the Canton of Vaud and Belgium, and devotes one-fifth of his book to a discussion of the registration system in France, only to inform us that no system of title registration exists in France, nor is likely to be established there.

The method pursued is the historical ; there is no systematic

discussion of the subject whatever. The author commences with a consideration of the Roman system of land transfers and a discussion of its disadvantages. He then shows how these defects have been overcome in Roman law countries like Germany and Austria. He takes up the Australian system and regards it as a spontaneous production of the soil. That it was developed by economic conditions prevailing in Australia out of the English system of registration is not even hinted at. The English system of title registration under the Westbury Act and the Cairns Act, are then considered. It is in this chapter that the reader will find most ground for dissatisfaction. The author approaches the subject with the most fragmentary knowledge of the history of the law of real estate in England, and falls into the most ludicrous errors.

The interchange at will of the terms *mortgagee* and *mortgagor*, as on page 63, may be errors imputable to the printer; but this cannot be the case where, on page 69, the author compares mortgage with *hypothèque*, and points out that they differ in that the mortgagee goes into possession of the mortgaged premises, and that lien creditors of the hypothecary debtor may sell his interest in the land, follow it into whosever hand it may come, and have priority of lien according to priority of time of record; which rights the author intimates are lacking under our system.

On page 50, the author enters into a lengthy discussion of the reason why England had no record system prior to 1862, and finds it in the difference between a mortgage and *hypothèque*. He concludes that "a system intended to preserve priority among several creditors" is unnecessary where, as in England, only one creditor can be secured by mortgage, instead of several, as in France! On page 49, in referring to an estate tail which he seems to regard as still existing, with all its original characteristics, he says that the tenant in tail "may confer some of his rights or all of them on the heirs of his body, but he cannot contract with any one else."

He seems to believe that the Westbury Act of 1862 was the first statute regarding the record of deeds and mortgages. The Statute of Enrolments, 27 Henry VIII, Chapter 16, and similar statutes passed in the reign of Charles II, Anne and George II, have no existence for him.

The author hints (p. 39 *et seq.*) at the relation between the *cadaster* and the system of title registration in Germany; but he does not show why the *cadaster* was the parent of title registration in Germany, but not in France.

He states (p. 25) that one of the essential features of title registration is compulsion, but he gives us no reasons for this conclusion. It would be interesting to know then in view of the absence of compulsion in England and the American States where title registration prevails.

In view of the author being a Frenchman, it would, perhaps, be ungracious to refer to his style, which is involved and not idiomatic, to his misuse of technical terms and to the inexactness of his language. A brief bibliography of the subject will be found on pages 26 to 28.

The importance of the subject and the lack of time of practicing lawyers to examine the working of title registration in other countries, makes this book most timely. If it shall stir up popular interest and promote the discussion of the problems involved, it will have been of great value to the public at large and to the legal profession in particular.

CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW.—By Raleigh C. Minor, Professor of Law in the University of Virginia. Boston. Little, Brown & Co., 1901. pp. lii, 575.

Professor Minor's treatise has indisputable merits. It is based on an unusually thorough examination and analysis of the American decisions. It is well arranged, and it is clearly and concisely written. There is a refreshing absence of "straddle": the author does not attempt, as do so many writers, to bring conflicting theories into apparent harmony by devising a formula which contains everything and says nothing. He distinguishes, compares, makes his choice and gives his reasons for making it.

The author is at his best in his analysis of the various problems. In his treatment of contracts, for example, he separates questions of validity, of obligation, of interpretation and of discharge; and questions of validity receive a further subdivision. The matter of assignment of debts is properly treated in a different part of the book, under personal property, but without confusing choses in action with tangible movables.

Excellent, also, as I have already indicated, are his analysis and presentation of the theories held by writers and courts. An unfortunate exception, however, must be noted in his statement of the theories regarding the validity of a foreign divorce, when only one of the parties was within the actual jurisdiction of the State granting the divorce (§§ 91 *et seq.*). In an earlier section he alludes to the theory that divorce is of the nature of a proceeding *in rem* (the *res*, of course, being the matrimonial relation), but he notes only the older English theory, that the law of the place where the marriage was contracted must be looked to in order to determine on what grounds the marriage may be dissolved. He nowhere indicates the existence of a theory that the competent court is the court of the matrimonial domicile, and that the husband's domicile is presumably the matrimonial domicile. He deals, indeed, in an earlier section, with the constructive domicile of the wife; and, in § 50, he discusses the question whether the wife can establish a separate domicile for divorce proceedings, but he states her power to do this without sufficient limitation. Consequently when, in § 92, he presents (without approving) the theory that "jurisdiction over one party confers jurisdiction over the other also," he gives no hint that a divorce granted to the husband in the State of the previous joint domicile is likely to be regarded in other States with more favor than a divorce granted to the wife in a State where she has established a separate residence. The reviewer submits that the theory which is tending to become dominant in the United States, as it is already dominant in England, and which is

sustained by the decisions of the United States Supreme Court, is that the wife cannot establish a separate domicile without good cause, and that in the absence of such separate domicile, a divorce granted to the husband by the court of his domicile, which is still constructively the matrimonial domicile, affects the wife, although no summons could be served upon her within the jurisdiction, and although she put in no answer.

The book is weakest on the constructive or synthetic side—in its attempt to formulate the principles which underlie the rules. Here the author's distinctions are often ill-advised and sometimes fantastic. For example: the theory which is rapidly gaining acceptance as regards personal property distinguishes between complexes of property that are to be regarded as entireties or estates, and single chattels; and teaches that personal estates are subject to the law of the domicile, but that movables, when they are not regarded as parts of an estate, are governed by the *lex rei sitæ*. For this distinction the author substitutes a distinction between involuntary and voluntary transfers, asserting that only involuntary transfers are governed by the *lex domicilii* (pages 270, *et seq.*). In order to bring testamentary succession under this category, he argues that while testation is a voluntary act, the testament takes effect only upon death, which is involuntary (pages 135, 136, 332). If this be true, the reviewer is moved to inquire (he hopes without undue frivolity) whether the law of the domicile would cease to govern in case the testator committed suicide. And it may be more seriously inquired why the author departs from his own principle as regards involuntary assignments in bankruptcy, and defends (against the English rule) the American practice of denying extraterritorial effect to the decree of the court of the domicile (§ 137). To say that *lex fori* governs is to beg the question, since the application of *lex fori* is the negation of the applicability of the rules of international private law.

As regards voluntary transfers he seems to maintain that *lex loci actus* ought to govern, but the cases show that this law is applied only when it happens to be either *lex domicilii* or *lex rei sitæ*. The tendency to apply *lex rei sitæ*, in cases of conflict, to transfers of single movables, whether the transfer be voluntary or involuntary, he explains as due to the fact that it is really *lex fori* (pp. 41 *et seq.*, 272 *et seq.*). This, however, is not true; the English courts, many of our State courts, and the United States Supreme Court, now recognize that an attachment or other transfer which is valid by the law of the site prevails over a prior assignment which is invalid by the law of the site, and this without regard to the question where the case is tried. It seems to the reviewer that the distinction between voluntary and involuntary transfers, employed as the author employs it, is unfortunate and bewildering; and that his identification of *lex rei sitæ* with *lex fori* as regards transfers of single movables is quite untenable.

If with his laudable desire to discover principles more fundamental than the English or American jurisprudence supplies, the

author had combined a greater familiarity with the writings of European continental jurists, he would doubtless have preferred some of their generalizations to his own. And he would hardly have said, as he does on page 1, in reference to a branch of the law that has had a continuous development since the eighth century and a rich literature since the fourteenth, that "only within the present century"—of course he means the nineteenth—"has any regular form been imparted to the subject." Nor would he have asserted in his preface, in such a manner as to suggest that it is his own discovery, "the fact that the great foundation and basic principle of private international law is *SITUS*," if he had been aware that this same basic principle was formulated with equal emphasis by Savigny in 1849.

To a person well versed in the subject, Professor Minor's book will be found interesting and suggestive, for the reasons set forth in the opening lines of this review. To a student approaching the subject for the first time it is likely to prove, in the special matters above instanced and in some others, confusing and misleading.

**CASES ON PRIVATE INTERNATIONAL LAW.**—By John W. Dwyer, Instructor of Law in the Department of Law of the University of Michigan. George Wahr, Ann Arbor, 1899. pp. viii, 509, ix.

A volume of 500 pages, printed in fairly large type, leaded, does not give room for cases covering any very extensive portion of the field of Conflict of Laws. The cases in Mr. Dwyer's compilation, however, are at least well selected—each apparently justifying its inclusion, either because of the intrinsic importance of the point decided, or because of the extent to which other decisions are reviewed and discussed.

**ELEMENTS OF AMERICAN JURISPRUDENCE.** By William C. Robinson, LL.D. Boston: Little, Brown & Co. 1900. pp. cviii, 401.

It is no hasty compilation, but the slowly ripened fruit of a long life of thought and experience, which the modest and distinguished scholar, whose name this volume bears, has here presented to us. For upwards of a generation one of the few men in the English-speaking world who have devoted themselves exclusively to the study and teaching of law, for many years a center of influence and authority in the Yale Law School and now the dean of the law faculty of the Catholic University of America at Washington, a profound student of other systems of law than our own, versed in the philosophy of the schoolmen whose doctrines have had such a curious influence on common law speculation, Professor Robinson has reached a position of authority which insures him expectant as well as respectful hearing. Nor is that expectation disappointed in the little work before us. To say that it is the most notable single contribution which our own country has yet made to the formal science of law would be to damn it with faint praise. It is not too much to say that it ranks easily with the systematic treatises of Holland,

Markby and Pollock, and that, for the American student, it must supplant them. Less formal than the first of these, more analytical than the last two, it constitutes an admirable presentation of the science elaborated by them and adapted, with rare intelligence and discrimination, to the conditions of our American system. In its more formal portions it is orthodox enough, adhering generally to the classification of Holland and employing the familiar terminology of that writer. But our author is no slavish follower of the older masters of his science and does not hesitate—as in his independent treatment of International Law (§§ 166-174) and his subdivision of Public Law (§ 178)—to make his own classification.

Fundamentally, however, Professor Robinson is as far as possible from being an adherent of the analytical school in jurisprudence or in philosophy, as his learned discussion of the Nature and Authority of Law (§§ 1-8), and of the Origin of Rights (§ 120), and the frequent references to Lorimer's Institutes abundantly shows. Apart from this distinctive note, too profound and far reaching to be considered here, the book performs a real and, for America, an indispensable service in imparting new vitality to the time-honored distinction between the written and the unwritten law and in elevating it to its place among the fundamental classifications of jurisprudence. Its sound and lucid exposition of the modifications effected in our legal system by the Federal and State Constitutions (§§ 240-282 *et passim*) is altogether admirable. To be especially commended, also, are the chapters on the Interpretation of Law (§§ 283-303) and the Application of Law (§§ 304-364). Incidentally, the criticism and rejection of the pedantic phrase, Private International Law, to describe the jurisdiction of law commonly styled the Conflict of Laws, will bring comfort to many.

After this recital of its excellences, it will not be deemed invidious to call attention to one or two defects of this treatise. It may be matter of opinion whether the topic of *Status* is, or is not, entitled to 53 pages out of the 364 constituting the book, but it will hardly be denied that a classification of law according to its departments (§§ 388-402) is incomplete without some recognition of Quasi contract rights; and such rights, properly defined under that title in § 128, are by the very terms of that definition excluded from the category of Contractual rights, in which they are placed.

The book would have gained greatly in attractiveness and readability if its text were continuous and not broken up into numbered paragraphs, but this defect is, probably, more than counterbalanced by the suitability of this form of presentation to the needs of the student and the class-room, while the carefully selected list of readings appended to each section gives this arrangement a distinctive value.

But it is the title of the book, and not its arrangement and matter, which is likely to call forth adverse criticism. Holland's exclusive appropriation of the term Jurisprudence to the science of comparative or general jurisprudence will by many be regarded as a sufficient reason for condemning the use by Professor Robinson of the term American Jurisprudence, while others, who have, by giving

thought, emancipated themselves from that thralldom, will refuse to concede that the differentiation of the law of the Republic from that of the parent state is sufficient to justify the term. Though Professor Holland in the latest edition of his admirable treatise (noticed in the March number of this REVIEW) adheres to and justifies his definition, it has been too completely discredited by the criticisms of Sir Frederick Pollock and others to exercise any further authority over our minds. Indeed, contradicted as it is by the narrow scope of the work in which it appears, which deals only with the legal ideas of occidental states having a common history and development, it is strange that it should ever have imposed upon us. There may, then, be an Occidental jurisprudence, and, by the same token, an Anglo-American jurisprudence, and, if the latter, why not an American jurisprudence, recognizing as fundamental the peculiar constitutional system under which our legal institutions, ideas and principles are developing. That the differentiation of our legal system from that of England, or from that of Europe at large, is not complete, is surely no reason for denying effect to such differences as do exist, provided they are fundamental and inherent in the nature of our institutions and the structure of our government. The work is certainly a treatise on *jurisprudence*—dealing, that is to say, not with the body of legal rules, but with legal relations and principles. And as many of these principles and relations are peculiar to American society and American law, it is not easy to see by what other term it could be described than that adopted as the title of the book before us.

**HISTORICAL JURISPRUDENCE.**—An Introduction to the Systematic Study of the Development of Law. By Guy Carlton Lee, Ph. D., New York: The Macmillan Company. pp. xv, 517.

Regarded as a collection of essays on the legal systems of various ancient and modern nations, this book justifies its appearance, but not its title, nor the claims made for it by its learned author. It is not a treatise on historical jurisprudence, as that phrase is commonly understood, nor yet as it is defined by Dr. Lee, in his excellent introductory chapter—The Province of Historical Jurisprudence,—for it has little to say of the genesis of legal ideas and it makes no attempt to trace the development of those ideas in the progressive evolution of society. With the exception of an infrequent and tantalizing cross-reference—as from Babylonian baked clay to the Old Testament and Plutarch (page 27) and the too-general statement that the Persians “adopted to a large extent the Babylonian law” (page 49)—there is no attempt at a comparative study of legal ideas or institutions, nor any examination of the philosophical bases on which the various systems taken under review rests,—still less of those fundamental conceptions, common to all systems, on which human law and justice rest. Indeed the theme, as conceived by the author, is too vast to be dealt with in a volume of 500 pages otherwise than in the superficial and sketchy manner in which it is presented to us here.



On the other hand, it is to be said that this series of a dozen or more independent studies of various legal systems, from Assurbani-pal to Bracton, presents clearly and succinctly the principal facts of those systems, and, taken together, constitutes a valuable and interesting record of the ever-futile, but never ceasing struggle of humanity to combine justice with the demands of a progressive society. The work evinces extensive and careful reading in more than one literature, and a considerable acquaintance with the usual sources of information (the curious statement of the preface that the text "is generally based upon original research," is obviously not to be understood in the usual sense of those terms) but displays no unusual grasp or insight into legal relations. In short, the book is not the work of a jurist, but of a historian—a competent one, it is true, with a gift for exposition and the faculty of easy narration. It will not serve the purposes of the scholar, but the professional reader will find in it abundant matter of interest and instruction.

Reviews to follow:

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

CLERK'S ASSISTANT. By Austin Abbott, LL.D. Revised Edition. By Clarence F. Birdseye. New York: Baker, Voorhis & Co. 1900. pp. x., 1091.

PROBATE REPORTS ANNOTATED. Vol. IV. New York: Baker, Voorhis & Co. 1900. pp. xxxiii, 767.

AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION. By John S. Ewart, Esq. Chicago: Callaghan & Co. 1900. pp. xlvii, 548.

A BRIEF FOR THE TRIAL OF CIVIL ISSUES BEFORE A JURY. Austin Abbott. Second and enlarged edition. By the Publishers' Editorial Staff. Rochester: The Lawyer's Co-operative Publishing Company. 1900. pp. xiii, 603.

A SELECTION OF CASES ON THE LAW OF INSURANCE. Edwin H. Woodruff. New York: Baker, Voorhis & Company. 1900. pp. xiii, 591.

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Francis Newton Thorpe. Chicago: Callaghan & Co. 1901. pp. Vol. I, xxi, 595; Vol. II, xix, 685; Vol. III, xvi, 718.

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DIGEST OF THE CODE OF CIVIL PROCEDURE. Being a synopsis of the Code. By Charles W. Disbrow, of the New York Bar. Albany: Matthew Bender. 1901. pp. 151.

THE RELATION OF POLITICS TO THE MORAL LAW. By Gustav Ruemelin, Late Chancellor of the University of Tübingen. Translated from the German by Rudolf Tombo, Jr., Ph.D., Columbia University. New York: The MacMillan Co. 1901. pp. 125.

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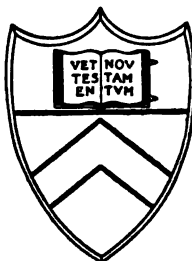
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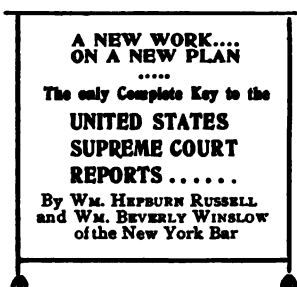
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# COLUMBIA LAW REVIEW.

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## MOORE *V.S.* LITTELL AND THE JACKSON TITLE.

THE interesting article of Mr. Chaplin in the May number of the REVIEW draws attention to the case of *Moore v. Littell*. The history of the litigation of which that case formed a part will throw some light upon the character of the decision.

In 1832, Samuel Jackson, being owner of the Hayscale farm in what is now the Borough of Brooklyn, desiring to make provision for a cousin, conveyed the farm to John Jackson for and during his natural life, and after his decease to his heirs and assigns forever. John Jackson took possession of the farm and cultivated it, and brought up there a family of eleven children. The village of Brooklyn became a city and grew up to the farm; streets were laid out through the farm which spoiled it for farming purposes, and assessments were laid upon the land which John Jackson was unable to pay. He was advised to convey his life estate to his children, and that if they would then make partition with warranty, each grantee could make good title to the land conveyed to him. This was accordingly done, and mortgages were made by some of the children upon the land conveyed to them in severalty. Notwithstanding these transactions, the general opinion of counsel was unfavorable to the title, and the children found themselves with deeds of land which they could not sell. The mortgages given by some of them were foreclosed and

the lots covered by them sold for a trifle, judgments were recovered against the mortgagors for deficiency upon the sale, and under these judgments sales of their right, title and interest in the land respectively conveyed to them were made. These sales were mostly for one or two dollars a lot. A few of the children had been able to hold on to the property which was intended for their ultimate support, but, unfortunately for them, John Jackson lived to the age of eighty-nine, and most of the children were unable to carry the property during this long life. Two years before his death one of his daughters died, leaving a son, Fanning Baldwin, and finally in 1861 the life tenant died, and the title became manageable.

In 1862 I first became acquainted with this title. My instruction from Professor Washburn at the Harvard Law School was then too recent to admit of a doubt in my mind that a remainder limited to the heirs of a person living was a contingent remainder. The older counsel in the case concurred in this view, and we agreed that a new partition should be had. This was effected substantially on the lines of the original partition. Then Herbert T. Moore, who had acquired title under the foreclosure of a mortgage given by two of the children, brought an action in ejectment against the tenant of one of these children. The case was argued before the General Term of the Supreme Court. A very able opinion was delivered by Judge Lott.<sup>1</sup> The Court held that the remainder was contingent, but it also held that, under the New York Revised Statutes, a contingent remainder was alienable in the same manner as an estate in possession; and that accordingly the ten children of John Jackson who survived their father had conveyed their interest in the remainder by a valid conveyance, but that the conveyance of Fanny Jackson, the mother of Fanning Baldwin, who died before her father, was ineffective, and that consequently this one-eleventh had not been conveyed to Moore. It would have been well for the children of John Jackson if they had acquiesced in this decision. But there were other questions arising under the title which were debatable, and they decided

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<sup>1</sup> Reported 40 Barb., 488, and with a note in 3 Am. Law Reg. (N. S.), 144.



to appeal to the Court of Appeals. In the state of the Calendar of the Court at that time, five years were required before an appeal could be heard. Meanwhile it seemed reasonably clear that under the decision of the General Term the remainder, being contingent, was not the subject of sale on execution. Accordingly an action was brought by Parmenus Jackson against Middleton, who held title to a large number of these judgment sales, requiring him to come in and assert his title or be barred. The General Term of the Supreme Court held that the judgment sales were valid only so far as the estate for the life of John Jackson was concerned, and rendered judgment in favor of the plaintiff.<sup>1</sup> Middleton refused to appeal from this judgment, and the Jackson heirs acquired title to all the lots which had been conveyed to Middleton by a sale upon the judgment for cost against him. To this extent, at least, actual justice was done in the case. Meanwhile the appeal in the case of *Moore vs. Littell* was nearly reached in the Court of Appeals. The counsel who represented other purchasers at the judgment sales, determined to prepare an agreed case for submission to that court. Without any notice whatever to the counsel for the Jacksons, this case was submitted at the term prior to that at which *Moore vs. Littell* was to be argued. The decision in this case, *House vs. Sheridan*, appeared at the end of 1868, greatly to the astonishment of the Jackson heirs and their counsel. We succeeded in keeping the case out of the official reports and moved for leave to reargue all the questions involved in *House vs. Sheridan*, on affidavits stating that the submission in it was collusive. The counsel who had brought about this submission of the *House* case consented to the granting of this motion. But meanwhile Keyes, an unauthorized reporter, had got hold of the decision and printed it without any authority of the Court,<sup>2</sup> as Judge Woodruff states<sup>3</sup>. That eminent lawyer who had been Chief Judge of the Court of Appeals, George F. Comstock, was brought into the case and made a masterly argument, which is very meagerly reported in *Moore vs. Littell*.

<sup>1</sup> *Jackson v. Middleton*, 52 Barb. 1.

<sup>2</sup> 4 Keyes, 569.

<sup>3</sup> *Moore v. Littell*, 41 N. Y. 71.

He convinced some of the Judges who had acquiesced in the decision of *Sheridan vs. House*, but Judge Woodruff adhered to his opinion. Unfortunately for the Jackson heirs, Judge Lott, for the first and only time in his life, changed his mind, although it was he who had written the opinion in the Court below that the remainder was contingent. He concurred with Judge Woodruff in holding the interest of the children a vested remainder. The Chief Judge and Judges Daniels and Grover dissented. Judge Grover presents the argument in favor of the proposition that the remainder was contingent most clearly, and there is no doubt that the weight of the judicial authority was with the dissenting opinion. Indeed, Judge Grover always said that the reason why the People of the State of New York abolished the old Court of Appeals and created the new Court—the decisions of which are reported in the series beginning 43 N. Y.—was that the old Court did not know the difference between a vested and a contingent remainder.

Not daunted by the defeat in *Moore vs. Littell*, and believing that, in a case involving the validity of the judgment sales, the new Court would overrule the decision of their predecessors as to the remainder, the case of *House vs. Jackson* was presented to the new Court in April, 1872. The writer of this article has very good reason to know that the Judges of the new Court of Appeals were of an opinion that if the question had been *res nova*, they would have held the remainder to be contingent.<sup>1</sup>

In short, they agreed with Judge Grover. But as the decision in the pending case was on the same title as that of *Moore vs. Littell*, they felt constrained to follow that decision, and carried it out to its logical conclusion. If the remainder was vested, the life estate would merge in this, when it was conveyed to the owner of the remainder. He thereupon would become seized of a present estate in fee, in which his wife would be entitled to dower, and so it was held in *House vs. Jackson*.<sup>2</sup>

The Court determined the last of the Jackson cases

<sup>1</sup> In *Purdy v. Hayt*, 92 N. Y. 447, 454, a remainder similar to that limited in the Jackson deed, was held to be contingent.

<sup>2</sup> 50 N. Y. 161.

in *Jackson vs. Littell*.<sup>1</sup> There a title derived under the foreclosure of one of the Jackson mortgages came under consideration. The party claiming under it maintained that the mortgagor was estopped to deny the mortgagee's title. But the Court held that if the mortgage contained no covenant of warranty, and the relation of the mortgagor and mortgagee had been extinguished by foreclosure, the mortgagor was not estopped from acquiring and claiming against the mortgagee under a paramount title.

Two ancient proverbs seem to be the moral for the lawyer who studies the history of the Jackson litigation, "Put your best foot forward." "Let well enough alone."

EVERETT P. WHEELER.

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<sup>1</sup> 56 N. Y. 108.

THE JOINT RESOLUTION OF CONGRESS  
RESPECTING RELATIONS BETWEEN THE  
UNITED STATES AND CUBA.

I.

ON March 2, 1901, the following Joint Resolution was enacted as an Amendment to the Army Appropriation Act:

That in fulfillment of the declaration contained in the Joint Resolution approved April 20, 1898, entitled, "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution<sup>1</sup> which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

1. That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

2. That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government, shall be in adequate.

3. That the government of Cuba consents that the

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<sup>1</sup> In the following discussion no account is taken of the work of the Constitutional Convention in Cuba, because the Convention being still in session, the Constitution it has drafted cannot be considered as a completed instrument.

United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

4. That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

5. That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

7. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

8. That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

The declaration contained in the Joint Resolution of April 20, 1898, reads as follows:

Fourth—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people.

## II.

### THE RESOLUTION AND OUR PROMISE TO CUBA.

Before considering the Resolution of 1901 in detail, it is important to determine whether it violates the declaration

of the Resolution of 1898 by the mere fact that it imposes conditions precedent to our evacuation of Cuba.

Some would dismiss this question altogether, and annex Cuba forthwith. It is argued that the declaration is not binding because it was made in a moment of excitement, or because it was never a real contract, but at best a promise without consideration, or because the Cubans are unfit to govern themselves. Less repulsive, because of its candor, is the masterful assertion that the United States need Cuba in their business, and do not intend to be balked by a promise. The corrective of these shifty and cynical evasions is found in the assurance that the declaration of 1898 is as binding on the conscience of the American people as though it were embodied formally in a treaty; and, in fact, it is substantially recognized in the Treaty of Paris. Altered conditions, violation of reciprocal engagements, impossibility of performance, have now and again been urged in justification or apology for disregarding international pledges. None of these pleas will avail here. The breaking of our pledge to Cuba would involve a gross breach of national faith that must at some time, in some way, bring retribution far outweighing any present material gains arising from a forcible annexation. To the flippant notion that there is really no moral law for nations, I oppose an admirable statement of the doctrine of national responsibility lately made by one of Great Britain's foremost jurists. "All my life," says Lord Hobhouse in a private letter, "I have insisted, with general acceptance one fancies, that the code of morals and justice is the same between nations as between individuals; with the addition that the nation which never dies is even more certain to reap the fruits of conduct, whether bitter or sweet, than the individual who may die before the fruits ripen."

The United States can honorably recall their promise only upon a request for immediate annexation preferred by the Cuban people. If this overture shall be made, the propriety of incorporating the island in the United States will be for the first time fairly presented for discussion.

While the declaration of 1898 should be respected as a binding promise, there is no merit either in the complaint

that our presence in Cuba to-day is a proof of bad faith, or in the assertion that our withdrawal must be absolutely unconditional. Three years ago I said :

“The early installation of a Cuban government is desirable, not only for the sake of the Cubans, but because, pending this event, the United States must undertake the provisional control of the island. The undertaking will be sufficiently vexatious, even assuming, as I do, that it will be confided to trained soldiers and not to uniformed politicians. Yet it will be better to prolong our control than to recognize prematurely a Cuban government. When the authority of Spain shall disappear, the authority of the United States must replace it and prevail until a responsible local government shall be ready to assume control. The Government of Cuba, which shall be definitely recognized by the United States, and may thereafter claim recognition from other nations, must be organized or ratified by the people of Cuba, freely deliberating and acting under the protection of our impartial authority. Although the United States will not assume to present Cuba with a plan of government, they should condition recognition upon the adoption of a plan which shall establish a new nation upon principles of justice.

“A further condition of recognition may be the ratification of a treaty containing such engagements and guarantees as may be necessary to secure the interests of the United States.”<sup>1</sup>

I see no reason for altering these opinions. I have attributed a broad meaning to that “pacification” of Cuba, which is to be a signal for our withdrawal (The Law and Policy of Annexation, page 177); and I do not condemn the Resolution of 1901 merely because it contains conditions, but proceed to examine its several articles in a convenient order.

### III.

#### THE FIRST SEVEN ARTICLES.

4. That all acts of the United States in Cuba during its military occupancy thereof, are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

This article recognizes the obligation of the new republic to consider the military government of the United

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<sup>1</sup> Notes on the Foreign Policy of the United States, June, 1898, p. 6.

States as its legitimate predecessor, an obligation imposed independently by the principles of public law commonly accepted by civilized people. Even a *de jure* government coming into its own upon the collapse of its *de facto* predecessor is generally expected to respect private rights which have vested under the usurper, to respect his laws until they shall be changed, and to refrain from punishing persons for obeying his orders.

The chief interest in this article is likely to center upon its effect upon private claims to property arising during the military *régime*. On principle, as well as by the terms of the article, the new government of Cuba is not obliged to respect as a vested right any claim to property based upon an act of the military government. To confer a vested, or in the phrase of the article a "lawful" right, the military government must exercise lawful powers, and the question is what restraints are imposed upon it.

A notable restraint is imposed by the act of Congress of March 3, 1899, ordaining that "no property, franchises or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States."

Possibly some restraint may be inferred from provisions of the Treaty of Paris under which the United States formally occupied the island. Although the treaty is an agreement between the United States and Spain, it is a public record of obligation to which Cuba may be entitled to refer as a real party in interest.

Finally, while a military government in a foreign land, even a friendly and peaceful country like Cuba enjoys such vast powers that it may be said to be a law unto itself, it is not generally, and certainly the government in Cuba is not, a shapeless power without any law of its being. On the contrary, we have here a power of orderly, though simple, structure exerting authority according to some rule of procedure; and we perceive that the "acts" competent to create vested rights are essentially "laws," which indeed are the only source of "rights." And reminding ourselves that these laws are simply the decrees of a military government, we conclude that the "lawful rights" contemplated



by the article are such only as are based upon orders issued in conformity to the rules of this government. Evidently a claim of property based upon a decree issued in violation of the military rules is not entitled to respect at the hands of the new government.

## IV.

6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

Possibly some private interests would be promoted by distinguishing this island from the "Cuba" in which Congress has forbidden all grants of "property, franchises or concessions" during the term of our occupation, but, be this as it may, I shall assume that the matter will be determined by public considerations.

Assuming that the ownership of the island is reserved for negotiation between friendly states, each ready to ascertain and respect the rules of public law, I think it will fall to Cuba for this reason, among others, that the Spanish dependency we set out to free and, in the Treaty of Paris undertook to occupy temporarily, included the Isle of Pines in one of its provinces. However, the disposition of the Isle of Pines does not appear to be a matter of vital importance. While its retention by the United States might be resented as an abuse of power it would detract little from the physical integrity of Cuba, and nothing from her political independence.

## V.

5. That the Government of Cuba will execute, and as far as necessary extend, the plans already devised, or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba as well as to the commerce of the southern ports of the United States and the people residing therein.

Yellow fever in Cuba has long menaced the United States, and, at times, has been carried here in despite of our efforts. The United States, now having opportunity, may

justly demand a reasonable assurance of immunity. But the purpose of this article is very broad, including the welfare of Cuba as well as that of the United States. Would it not be better to limit our expressed concern in the sanitation of Cuba to the protection of our own country? Broad reasons of state, which I shall consider later, dissuade us from assuming a more intimate concern in Cuban affairs than is absolutely necessary, and in point of fact protective measures demanded for our own safety must tend, in themselves, to better the condition of the island.

Coming to the practical recommendations of the article, we find that sanitation is to be effected by executing "plans already devised, or other plans to be mutually agreed upon." Possibly "the plans already devised," which are to stand until changed by agreement, are formulated so precisely that any disregard of them can be brought to the notice of the Cuban authorities as a palpable breach of contract. Yet, considering the vexed questions in sanitary science, and the seeming aversion of Cubans to costly expenditures for the cleansing of cities, there seems to be room for much irritating controversy, with the advantage on the side of Cuba, in whose hands alone is placed the execution of sanitary measures. The United States have only the right to complain.

Viewing the article as a whole it appears to evince a very broad interest in the sanitation of Cuba without asserting an effective control in respect of the vital matter—the welfare of the United States. We can complain to Cuba should yellow fever enter our country through her neglect, but we cannot prevent its being carried from the island.

I do not advise that the United States request the general power of sanitary police in Cuba, for among sovereign powers none is more searching and despotic. Cuba could not be independent with a corps of United States officials suppressing nuisances, installing works of sanitation and sending the bills to the local taxpayers. But by narrowing our interest in the sanitation of the island to the point of our intimate concern, could we not properly request efficient powers for our protection? Would it be unreasonable to ask that, for a term of years at least, vessels clearing

from Cuban ports should carry a clean bill of health from United States officials stationed therein and having a jurisdiction defined by agreement? This would not involve a discreditable impairment of Cuban sovereignty, and foreign states could not justly infer a political union between the United States and Cuba because in the ports of the island we exercised powers beneficial to the world at large.

## VI.

2. That said Government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.

This article commends the wholesome principle that a state should not borrow beyond its reasonable ability to repay, but does not define it. "Reasonable sinking fund," "ordinary revenues," "current expenses of the government" are very flexible terms in the very flexible processes of public finance. Perhaps the first may be practically determined in some measure by accepted principles of finance, but there is no legal standard of reasonableness. Then what, broadly speaking, are the current expenses of a state if not whatever the state spends, without regard to the items? Perhaps, as a matter of convenient bookkeeping, interest and sinking fund charges should not be included in a current expense account, but this is not required by any general rule applicable here; and even if it be assumed that this method of accounting is intended to be prescribed for Cuba by the particular law of this article, we are still unable to attribute precision to the article as a whole: For what are "ordinary revenues?" Clearly these include at the very least all proceeds of taxation, and if no limit be set upon the taxing power of a Cuban government, how can we avoid the conclusion that the "ordinary revenues of the island" will include whatever taxes the legislature may choose to levy?

In fine, the requirement that the sums applicable to sinking fund and interest charges shall be the difference between "current expenses," which perchance may here be partially defined, and "ordinary revenues," which depend upon an unlimited taxing power, is too vague to suggest in

itself an effective restraint on legislative borrowing. There seems to be nothing in the phraseology of the clause to disable a Cuban government from lawfully borrowing money to any amount and upon any terms to which lenders may agree, provided the authorizing statute embodies a scheme of taxation which on its face is not inadequate. The taxes may thereafter be lowered or repealed or diverted, they may not be collected, current expenses may be vastly increased, all to the damage of the sinking fund and interest; but the debt is incurred and remains a charge upon the island.

Further scrutiny of this article suggests the question whether it does not inadvertently deprive the Cuban government of an ordinary use of its public lands. The lands may be sold forthwith or leased, but the requirement that any public debt shall be secured by the ordinary revenues of the island seems to forbid the pledging of these lands as the immediate security for loans. Yet a Cuban government may find in a prudent administration of its landed estate an available method of raising and redeeming the loans it may require.

What I have written has regard to loans for the use of the new government of Cuba. In addition, the article is evidently intended to apply to the assumption of loans heretofore negotiated by other borrowers; that is to say, by the late revolutionary organization in Cuba and by Spain.

Now, the bonds issued by the revolutionary organization have no legal standing anywhere, because the organization itself never had a legal existence. Nor will the installation of a new government of Cuba confer retroactively a status upon the old organization, as might be the case where a well organized insurgent government, especially one enjoying the left-handed status of a belligerent, finally attains to the dignity of a sovereign state. The revolutionary organization will be the ancestor of the new republic in a historical sense only. Nevertheless, the publication of the details of the revolutionary loan may disclose equitable claims upon the new government which it will be bound in honor to acknowledge.

The bonds issued by Spain on Cuban account are legal

obligations. During the negotiation of the Treaty of Paris Spain demanded that this debt be expressly recognized as a charge upon Cuba, and, as an alternative, she pressed the United States to accept a cession of the island, with the idea that liability would accompany proprietorship. The demand was refused. The question of inferential liability was avoided, the United States assuming merely provisional control, and leaving the proprietary title to the island in suspense. Thus the Treaty of Paris did not settle the question of the Spanish bonds. On the contrary, the appearance of a sovereign proprietor of Cuba at the termination of the provisional régime will afford the first opportunity for presenting a formal demand on account of these bonds to a government competent to consider it. Whether there will be any demand presented on account of the Spanish debt, or if so, in what form and for what amount are speculations beyond the scope of this paper, though it may be suggested in passing, that while the vast sums for which Spain obligated herself in order to combat insurrection are not a proper charge on the island, it is not impossible that equitable claims may be presented on account of borrowed moneys actually expended for the permanent benefit of the island. Returning to our subject, I find that the clause may suffice to discredit an assumption of Spanish or revolutionary debts by an act of the legislature simply acknowledging liability, because it requires a concurrent provision for payment; but it is not perceived why, under the taxing power, this provision might not be made. Certainly if recognition by Cuba of enormous debts contracted to her hurt is a real danger to be apprehended, this article contains in itself no assurance of protection.

But even conceding more definite and meritorious possibilities to this financial article than I can perceive, there remains the critical question whether its effective application rests with the United States alone or with Cuba alone. One or the other must prevail. There is no provision nor indeed any reason for joint action. In the first case we must suppose that if Cuba wishes to borrow one million or one hundred million dollars—the amount is immaterial—she must first submit the project to the United States. The

President would naturally receive the communication as our representative in foreign affairs, and I think that considerations of law, to say nothing of convenience, would warrant him in disposing of the matter without the concurrence of Congress. The President of the United States would be the arbiter of Cuban loans. At this point some one, convinced that the United States must exercise a certain supervision over Cuban finance, may demur to this procedure as being unnecessarily drastic, but it must be insisted that unless supervision includes a power to restrain an issue of bonds, it is unsubstantial, for bonds once marketed become specific obligations. The President would take time to examine the project which, meanwhile, might be so prejudiced by a change in market conditions as to require its abandonment, or else its revision with the risk of further vexations.

Should the project be approved by the President and the loan floated, would not the United States be considered, as in some sense, its guarantor? I am not suggesting, of course, any legal liability, even in the broad meaning of international law, but the mere fact of setting our seal upon Cuban bonds must give them a certain currency in the market, and, in the event of repudiation, a possibility which no care in the creation of a national loan can certainly prevent, we would probably be requested to bring the delinquent to terms. Such a request we could not refuse with the excuse, which has accompanied our waiver of suggestions that we should press delinquent States of the Union to satisfy foreign bondholders, that the creation and redemption of State debts are alike beyond the competency of the Federal Government—the bonds of Cuba would be issued under our auspices.

Fortunately for the present convenience of the United States this financial article seems to accord to us no right of interposition, for the short reason that such a right, being in derogation of Cuban sovereignty, must be plainly expressed. I think we must view this article as a rather vague declaration of principle to be interpreted by Cuba alone; not an efficient restraint upon improvident borrowing, yet by its mere presence tending to the disadvantage of Cuba in all financial negotiations.

The reason paraded for our interest in Cuban finance is that otherwise Cuba might incur obligations which a European state might attempt to enforce in behalf of its citizen bondholders. Space will not permit a discussion of the interesting questions as to when a state may present itself before a sister state as the imperious agent of injured bondholders, and what pressure it may properly bring to bear upon the sovereign debtor whom no process of law can reach. Commonly these questions lie within the domain of statecraft, rather than in that of international law, and are active when a state finds it convenient to press a creditor's complaint in order to further some political design: Witness the action of France in seizing upon the repudiation of the notorious Jecker loan as a pretext for invading Mexico. Regarding any apprehension of enforcement of Cuban obligations by conquest, I have only to say that declarations in treaty or constitution are not needed to warn a European state that to conquer Cuba it must defeat the United States. Regarding action not amounting to conquest which one government may take against another in behalf of citizen bondholders, Cuba should take its chance with our other neighbor states, the United States governing their own conduct by the circumstances of the case.

The true reason for professing an intimate concern in Cuban finance is the desire to annex the island without annexing at the same time heavy obligations. Should Cuba be annexed without concurrent admission to statehood, the United States would be responsible for the entire national debt of the island however secured, for all public powers and all public property would pass into their hands. And the United States would be responsible for all provincial and municipal debts in this sense that, having the whole power of taxation in their hands, they would be bound to exert this power, which is always the ultimate security for public debts. Our Government could no more plead irresponsibility for the debt of Havana than for the debt of the City of Washington.

Should Cuba be annexed as a state of the Union there might be a demand for an equitable apportionment of indebtedness between the Federal and State Governments;

though on the annexation of Texas it was agreed between the United States and Texas that the former should not be responsible for any part of the Texan debt, the latter retaining all public funds and dues, and all other public property excepting that pertaining to national defense. Thereafter we dismissed the suggestion that, as we had taken over from Texas the power to levy customs duties, we should assume a portion of the Texan debt originally charged upon such duties; but, after appropriating certain lands claimed by Texas and pledged for her debt, we paid indemnity.

Without anticipating the possible difficulties attending an apportionment in the case of Cuba, it may be suggested in a general way that a specific debt should be a charge upon that government, state or federal, which becomes entitled to property pledged to secure it, or to public works constructed with its proceeds, or becomes invested with power to raise the revenues upon which the debt is a proper charge.

While I criticise this financial article I am not prepared to say that the United States should disclaim all concern in the establishment of Cuban finance upon a basis which promises at least a prudent use of borrowing powers. The best basis would be a limitation on the creation of indebtedness embodied in the Constitution of Cuba, and so clearly defined that prudent financiers would only subscribe to valid loans, and reckless speculators would have no right to complain of the non-payment of invalid ones. By this constitutional method many cities in the United States and some of the States have sought protection from evils attending an unlimited power to create public debts, and a Cuban Convention would not impair the dignity of the new republic by following their example.

## VII.

1. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise lodgment or control over any portion of said island.



So far as this article bespeaks the freedom of the island from European domination it contemplates a condition predetermined by the United States. Of all our policies regarding America none is so widely accepted at home and so thoroughly known abroad as our determination that Cuba shall not pass into the control of a European power. During the Spanish domination the United States declared more than once that neither by purchase or conquest should Cuba be transferred to another European state, and refused to agree with Great Britain and France to maintain the *status quo*, on the ground that our interest in the island was singular and paramount.

The expulsion of Spain has emphasized this policy : Our power to enforce it has been vastly increased. Is it advisable to define now this traditional policy, and seek a legal sanction of questionable value for a position hitherto developed by the flexible and convenient methods of diplomacy? The policy can gain no strength from law, and might lose some of that elasticity which should distinguish all foreign policies. Our interest in the independence of Cuba, or, to speak plainly, our concern in having a harmless neighbor on the island instead of a powerful one is essentially arbitrary, and it should be dissociated from all legal forms and obligations. And for this broad reason I would eliminate from the Treaty the provision that Cuba shall not give any lodgment to a foreign state. Instead of formally asserting our concern in this matter let Cuba follow the lead of other Spanish-American republics and forbid in her constitution any session of land to a foreign state, making the prohibition broad enough to cover the acquisition of any interest whatever, excepting, of course, for diplomatic and consular purposes.

The contingency of Cuba's seeking union with, or being invaded by another Spanish-American state need not be contemplated in a treaty. The attitude of the United States in either event may safely be left an open question.

#### VIII.

7. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will

sell or lease to the United States lands necessary for coal-  
ing or naval stations at certain specified points, to be  
agreed upon with the President of the United States.

While the war with Spain was in progress I said, in an-  
ticipation of our victory: "Thenceforth the United States  
will enjoy acknowledged supremacy in the Gulf of Mexico  
and the Caribbean Sea. Outposts in the West Indies will  
be the visible signs of supremacy; and it may appear that  
one or more of these may be located in Cuba itself, as well  
to the advantage of the Cubans as our own."<sup>1</sup> And I am  
still of the opinion that the promise of the Resolution of  
1898 does not forbid necessarily an honorable demand for a  
couple of stations in Cuba. But the demand as presented  
in this Article is verbose and imperfect.

Three reasons for acquiring stations are expressed,  
whereas reasons are superfluous when, as here, they impose  
no real limitation on use. The United States occupying  
stations may, in fact, utilize them for making a conquest of  
the island as well as for the friendly purposes specified.

The demand is imperfect. There is uncertainty of title—  
"Cuba will sell or lease \* \* \* lands necessary for coal-  
ing or naval stations." Will our possession be permanent  
or temporary? Will land leased or even sold for a specified  
use pass within our jurisdiction for other purposes? May  
land acquired as a naval station be used as an army post?  
There is uncertainty of location. The number of outposts,  
their sites, their areas is not defined; yet in view of our  
promise to Cuba, the propriety of this demand depends  
largely upon its objective points. The island will be left  
substantially in the control of its people even though outposts  
of the United States be located at Cape Maysi and Cape  
Antonio, but what if they be maintained at Havana and  
Santiago? There is, in terms at least, uncertainty of exe-  
cution—Cuba will transfer lands to the United States  
when it comes to an agreement with our President upon  
the particular tracts.

To the end that the United States may acquire full  
sovereignty over such tracts in Cuba as it may honorably  
demand, there should be substituted for this Article one

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<sup>1</sup> Notes on The Foreign Policy of the United States, June, 1898.

commencing "Cuba cedes to the United States," and describing the desired tracts. And it might be advisable to separate the possessions of the United States from Cuban territory by a neutral strip, as Gibraltar is separated from Spain.

## IX.

3. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

"Intervention" is a very broad title in international law, but it always suggests the threat or use of force, and presumably involves some derogation from the sovereignty of the state in whose dominions it is exercised. "Intervention" covers pretty much every hostile act, short of the acts of formal war—note of warning, imperative demand, armed demonstration, invasion. This vast power is now demanded by the United States over Cuba as a treaty right, and we will first consider the several purposes for which it is expressly desired.

The first cause for intervention is "the maintenance of Cuban independence." This cause need not be expressed, for the reasons already given for leaving the entire question of independence to be dealt with by the United States in accordance with time-honored policy. A formal consent in advance given by Cuba would not materially strengthen this policy in action.

Another cause for intervention is neglect to discharge "the obligations with respect to Cuba imposed by the Treaty of Paris upon the United States, now to be assumed and undertaken by the Government of Cuba." What are these obligations?

It is argued that by virtue of the Sixteenth Article of this Treaty, the United States are in duty bound to assure performance by Cuba of the obligations which they assumed

by the First Article.<sup>1</sup> The First Article reads: "Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." The Sixteenth Article reads: "It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations." The obligations of the First Article, though, under the circumstances, not improperly assumed by the United States in form, do not depend upon formal assumption for existence. They are, essentially, duties imposed by the usage of the world upon any sovereign occupant of territory in respect of all foreign persons and property within its borders; and if the installation of a Cuban government still left the United States charged with securing the performance of these obligations by the new state, we would be involved in every petty trouble arising between Cuba and a foreign country. Fortunately, this vexatious consequence is not contemplated by the Treaty of Paris. The "obligations" of the First Article are not the "obligations" of the Sixteenth, according to international law, to say nothing of the text: The former inevitably cease with the termination of our occupation; and the United States are not called upon to "advise" a Cuban government to assume formally those international obligations attributed to all governments; though in this relation it should be recalled that, by the Fourth Article of this Joint Resolution, Cuba is to respect all rights, including the rights of foreigners, lawfully acquired during our occupation.

The "obligations" referred to in the Sixteenth Article of the Treaty of Paris, and which are not already fully executed, are contained in articles respecting freedom of religion, protection of Spanish copyright, free entry of

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<sup>1</sup> The Solution of the Cuban Problem, by Senator O. H. Platt, in "The World's Work," April, 1901.

Spanish scientific, literary and artistic works, etc. The United States should "advise" Cuba to respect these obligations. Probably they should be recognized in the constitution of Cuba. But to "advise" is not to "compel"; and the character of these obligations does not justify a formal demand for the tremendous power of intervention on their account.

The third cause for intervention presents the most serious question in the whole Resolution. The United States demand consent to intervene for "the maintenance of a government adequate for the protection of life, property and individual liberty."

In virtue of this clause any act committed in Cuba in violation of rights of life, property or liberty, seems to be an offense against the United States, whether the victim be a Cuban, or a foreigner of United States, or other nationality. It is understood that the Administration does not attach so extensive a meaning to the clause, and has informed delegates from the Cuban Constitutional Convention that the causes for actual intervention are limited to offenses of the very grossest description. Certainly this is an eminently proper anticipation, but executive comments and representations do not constitute an authoritative limitation on the words of this resolution of Congress intended to be some day embodied in a treaty.

A right of intervention is claimed in very broad, if not indeed vague, terms, and any Administration considering the question of exercising it may look to the terms for authority, and not to conversations between United States officials and Cuban delegates. Whether the right shall be exercised rarely or frequently, reasonably or unreasonably, are questions within the discretion of the United States, or, precisely, to note a point sometimes neglected, within the discretion of the President, who is charged with the execution of the treaties, as well as of the other laws of the United States. Intervention under the treaty will not necessarily be ordered by Congress.

The offenses covered by the clause may be divided roughly into two categories: Acts done in defiance of the Cuban government; *e. g.*, the acts of bandits and revolu-

tionists: Acts done by the authority of the government; *e. g.*, proscriptions and confiscations, and, possibly, the plain disregard by legislatures and courts of rights accorded by the Cuban constitution.

Intervening actively in cases within the first category the United States would act, nominally, as a policeman assisting a weak government to maintain the peace, yet inevitably substituting to a greater or less degree their own authority and their own responsibility for the authority and responsibility of the Cuban government. However vexatious this condition might prove to be there would, at least, be no state of war with its inconvenient consequences, unless, perhaps, we should drift into a conflict with the government we had set out to maintain.

In offenses of the second category, the Cuban government is itself the offender. Now, a strict construction of the clause might eliminate these offenses from its purview on the ground that Cuba consents to our intervention for the "maintenance" of a government whenever it is incapable of performing its duties unaided, and not for the purpose of calling to account a government guilty of willful dereliction. Without positively rejecting this construction, I think that the broader meaning I have given is correct, and that a Cuban government is asked to extend a formal invitation to the United States to chastise it for misdeeds, as well as to assist it in performing its duties. Intervening actively on account of offenses in the second category, the United States would appear as the enemy of the Cuban government.

.X.

The Third Article brings into prominence the great question of the proposed relation of the Cuban Republic to the United States, and this will be considered first from the standpoint of international law, and then in the light of the particular rule we have imposed upon ourselves in the promise "to leave the government and control of the island to its people."

There is nothing in the Joint Resolution to prevent Cuba from claiming and receiving that formal recognition which is the sign of membership in the family of nations. She

will enjoy notable prerogatives of sovereignty: The right to fly a national flag, to send and receive ministers and consuls, to negotiate treaties for all common and many extraordinary purposes, and to maintain an army and navy. Unlike a protected state, she will suffer no hindrance to foreign intercourse in the person of a resident representative of the protecting power, nor, like the South African Republic, will she be compelled by convention to submit her treaty projects to a "suzerain." A foreign state will find in Cuba a fellow-sovereign competent to observe all the forms, and assume all the responsibilities attending friendly international intercourse. And, in case of trouble, she will not find Cuba disabled by any provision of the Joint Resolution from redressing or resenting injuries without seeking the permission or assistance of the United States. Neither the Third, nor any other Article constitutes the United States the constant sponsor for Cuba. Whether a foreign state, pressing Cuba for redress of injuries, shall be confronted by the United States is a question of circumstance—in theory, as much a question of circumstance as our attitude toward foreign pressure upon Nicaragua or Colombia or the other Spanish-American states. It seems, therefore—though one hesitates to predict the precise status of a country like Cuba—that Cuba will be, in international law, neither a vassal nor a protected state, but an independent sovereign, shadowed, however, by an express liability to intervention from the United States.

From the independence of Cuba, internationally, we may infer important consequences. In the event of war between the United States and another nation Cuban territory ought not to be involved. Another consequence might be, that should we intervene against a Cuban government, we could not hold foreign nations from recognizing the existence of a state of war, by arguing, as England did in the case of the Transvaal, that we were merely chastising a vassal. I suspect that the notion that we could make this argument, provided we obtained Cuba's consent in advance, had something to do with the phrasing, if not the presence of the Third Article of the Resolution; yet the argument, if not fallacious, would be dishonorable, for it is based on the

condition of dependency, whereas we have promised Cuba independence.

Does the independence of Cuba from an international standpoint relieve the United States from the imputation of violating in the Resolution of 1901, especially in the Third Article, the promise of the Resolution of 1898? Technically, I think it has this effect; and, still clinging to technicality, it may be shrewdly argued that anyway Cuba is not actually taken from "the government and control of its people," merely because the United States demand leave to intervene upon the happening of uncertain events. Technicalities dismissed, the United States will be defenceless against the charge of violating the spirit, if not the letter, of their promise, for they seek a formal sanction for what is potentially a power to interfere pretty much at pleasure with "the government and control" of Cuba. The effect of this breach of faith must be serious. The Cuban government, launched by the United States with an expression of contempt for its capacity, will inevitably be embarrassed by our mistrust: Stigmatized as an object of suspicion, is it not likely to lack the self-reliance essential to administration, and to fail in the end, if only because failure was taken for granted? Looking further afield, we may expect that repudiation of our promise to Cuba will intensify that mistrust of the United States on the part of Spanish-American republics generally which every interest of politics and business prompts us to allay; and especially may we apprehend its effect on canal negotiations with Colombia or Nicaragua.

The disadvantages to the United States in insisting upon the acknowledgment of a right of intervention are not outweighed by the advantages claimed.

Our political interest in Cuba is, as I have shown, safeguarded by ample power to enforce our established policy. Our business interests are large, and will increase to our profit and to the benefit of the republic of Cuba, which will find in the development of its resources and the employment of its people the best assurance of stability. The United States may accord due protection to these interests in virtue of their sovereign powers, without exacting a



humiliating concession from Cuba, and, considering the magnitude and propinquity of the interests, the powers will, without doubt, be exerted effectively in case of need.

## XI.

Summarizing the results of our inquiry ; Article I should be excised. A provision against cession should be incorporated in the Cuban constitution.

Article II should be excised because it deals ineffectively with the debt question. A debt limitation may be placed in the constitution.

Article III involves a breach of our promise to Cuba, and, moreover, an unnecessary demand for power.

Article IV is an adequate and useful statement of public law.

Article V should perhaps be narrowed in purpose to the interests of the United States quarantine, and be amended so as to secure their better protection.

Article VI does not call for a positive expression of opinion, for the possession of the Isle of Pines is not a matter of vital interest, either to the United States or to Cuba.

Article VII should be amended so as to give to the United States full sovereignty over specified tracts.

## XII.

### THE EFFECT OF THE RESOLUTION.

The Preamble to the Joint Resolution reads :

That in the fulfilment of the declaration contained in the Joint Resolution approved April 20, 1898, entitled : " For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to " leave the government and control of the Island of Cuba to its people," as soon as a government shall have been established in said island, under a constitution which, either as a part thereof, or in an ordinance appended thereto, shall define the future relations of the United States with Cuba substantially as follows :

And the Eighth and last Article provides :

That by way of further assurance, the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

The Preamble and Eighth Article furnish the text for a discussion of the practical bearing of the Joint Resolution on our conduct toward Cuba.

In the Preamble Congress treats the declaration of 1898 as a promise to be put in the way of performance by the act of our national legislature, though the President was competent to renew the pledge by his own act. The disposition of Cuba is a question of foreign policy within the immediate sphere of executive competency; the provisional government of Cuba is really a United States army under immediate executive control. And the President, being entrusted with the "pacification" of Cuba, had authority to determine the fact of its accomplishment, and thereupon to withdraw our troops and recognize a Cuban government. Congress has now interposed, and, by authorizing the President to withdraw upon its terms, has forbidden him to withdraw at his discretion. In this respect the Joint Resolution has the force of a statute imposing restraints upon executive action.

Restraining conditions are plainly defined in the first seven articles of the Resolution; and the word "substantially" in the last line of the Preamble does not accord to the President any power of qualification.

The Eighth Article suggests a vexatious question. The articles of the Resolution are not only to be embodied in the organic law of Cuba; "by way of further assurance" the first seven are to be incorporated in a permanent treaty with the United States. Is the ratification of this treaty a condition precedent, or a condition subsequent to withdrawal? If precedent, the President is ordered to retain physical control over the island until the terms of Congress have been made the subject of treaty contract between the United States and Cuba; in this case the treaty may be practically dictated by the United States. If subsequent, he is to withdraw upon the establishment of a government

in whose organic law the terms are incorporated; in this case a treaty would be the result of free negotiations, and the United States could not complain should Cuba, acceding to their conditions, insist upon trade concessions in return.

On the first hypothesis, a condition precedent is inserted in disregard of the letter of the Preamble, whereby the establishment of a government and the adoption of a specific organic law is the signal for our withdrawal. On the second hypothesis, the United States must leave the island without an agreement under which they can formally require the enforcement of their conditions. These will be merely inscribed in the organic law of Cuba, which, by itself, is an instrument that may be altered or disregarded without breach of contract. The constitution of a foreign country is not, as such, an object of lawful interest to the United States.

That the phrasing of the resolution permits this question to be raised is a serious blemish in the document; but, however it be determined, the Eighth Article suggests another question of broad constitutional interest, and perhaps of practical importance, no matter which way the first shall be decided.

Is Congress competent to direct the President, and Senate to make a treaty? Its authority to limit the executive discretion of the President in the matter of our withdrawal from Cuba, by prescribing its own conditions, is conceded. But the President, besides being the executor of the laws of Congress, is himself a legislator, for, with the advice and consent of the Senate, he is empowered to make treaties, which become, like the statutes of Congress, the law of the land. A statute may, indeed, deprive a treaty of all domestic obligation, but so may a treaty qualify a statute; and the courts, when required to decide between conflicting treaty and statute, will respect the later law. The treaty-making body and Congress being separate legislatures of equal rank, neither can compel the other to exercise its functions. Certainly the President and Senate cannot by treaty force Congress—we mean here the House of Representatives—to make the appropriation of money that may be necessary to effectuate it. Nor can Congress

force the President and Senate to make a treaty in accordance with its ideas, or prevent their making one in accordance with their own.

Applying this law of the Constitution in the present case, we find that should the Cuban Convention reject the terms of Congress, either flatly or by presenting modifications or explanations, and should Congress, through the opposition of the House of Representatives, decline to alter them, the President and Senate may still redeem our promise by way of a treaty. And we find further that the treaty contemplated by the Eighth Article, whether it be precedent or subsequent to our withdrawal, may be lawfully made without regard to the terms formulated by Congress. In short, while Congress has lawfully restrained the President from evacuating Cuba at his discretion, it has not prevented the treaty-making body from effectuating our withdrawal from the island at their discretion. And to appreciate the office of this body in regard to our relation to the Cuban Republic, we must bear in mind that every condition for which the sanction of contract is desired must be embodied in a treaty.

Whether the conditions now proffered by Congress shall be accepted or rejected by the Cuban Convention, they are not necessarily unalterable. It is difficult to see how, in any circumstances, our withdrawal from the island can be accomplished before the next meeting of Congress, and it is to be hoped that then our promise may be fulfilled by a single act—by a treaty which shall at once define and secure our conditions. The terms formulated in the Joint Resolution, which was linked to an Army Appropriation Bill and hurried through the last stages of a busy session, will then be scrutinized. Faithless and useless conditions will be dismissed, and our reasonable demands be definitely secured. A deliberate choosing of new terms may prolong our control in Cuba, but it is more important to withdraw in good order than to withdraw soon.

CARMAN F. RANDOLPH.

## SET-OFF IN THE ADMINISTRATION OF INSOLVENT AND BANKRUPT ESTATES.

THE right of set-off has been extended in some instances in the English and American courts of bankruptcy further than the recognized rules of legal and equitable set-off seem to justify. We propose to examine two classes of cases in which courts of bankruptcy have apparently diverged from the equitable rule, and to inquire whether, under the present bankruptcy law, the precedents in these cases should be further followed.

An instance of the extended application of the doctrine of set-off in bankruptcy is found in the leading case of *Rose v. Hart*,<sup>1</sup> where the rule is laid down that a debtor to the bankrupt estate having in his possession property of the bankrupt with a present power of sale, though without a lien or other legal or equitable interest in the property, may after the bankruptcy sell the property and set off the proceeds against the debt.

This may be regarded as settled law in England,<sup>2</sup> and it is laid down by Judge Lowell as the law in this country under former statutes.<sup>3</sup> This rule has a somewhat remarkable history.

In 1748 a case, *In re Deese*,<sup>4</sup> came before Lord Hardwicke, in which he referred for the first time to the words "mutual credits" introduced some years before into the bankruptcy law. These words were not found in the common law statute of set-off which was confined to "mutual debts." In the case before Lord Hardwicke as reported, a packer claimed to retain goods, not only for the price of packing them, but the sum of five hundred pounds lent to the bankrupt on his note, and the Chancellor decided that

<sup>1</sup> 8 Taunt., 499; 2 Smith's Leading Cases, 10th Ed., 288.

<sup>2</sup> Robson's Bankruptcy, 10th Ed., 368; William's Bankruptcy, 7th Ed., 137.

<sup>3</sup> Lowell on Bankruptcy, § 256.

<sup>4</sup> 1 Atk. 228.

the packer might not only hold the goods for the amount of his lien, but also for the amount of the independent debt for which he had no lien, placing his decision upon the meaning of the words "mutual credits." Now, although the principle of set-off before its introduction by statute into bankruptcy, or at common law, had been applied in courts of equity, no case had then arisen or has since arisen in which set-off has been allowed in that court under circumstances similar to those which were before Lord Hardwicke, and his opinion as given by the reporter presents no argument in support of the extended meaning which he there appears to have given to the words of the statute.

Six years later the same question came before the same chancellor in *Ex parte Ockenden*,<sup>1</sup> apparently upon similar facts, but arising in a different trade. It then appeared that the earlier decision had been incorrectly reported and that evidence of a custom had been submitted in that case tending to establish a lien.<sup>2</sup> With this fact added, the Deeze case was transformed. It was merely the case of a lien upon the bankrupt's property and did not involve the right of set-off or the construction of the words "mutual credits." The Chancellor accordingly held that it did not afford authority for the decision of the case then before him in which no such evidence of custom was produced, and he accordingly disallowed the set-off for the reason that if it were permitted, a lien would be created when none had previously existed. Notwithstanding this decision, the earlier authority was followed in a line of cases.

Thus in *French v. Fenn*,<sup>3</sup> the bankrupt, Cox, was indebted to Fenn and had intrusted him with his interest in a string of pearls to sell and pay over his share of the profits. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignee brought an action against Fenn for his share in the profits, to which Fenn set off the debt due from Cox. The set-off was allowed on the authority of *In re Deeze*, without reference to the later case of *Ex parte Ockenden*. So in *Parker v. Carter*,<sup>4</sup> where policies of insurance were

<sup>1</sup> 1 Atk., 235.

<sup>2</sup> See Lord Hardwicke's notes of the case printed in a note to *Young v. Bank of Bengal*, 1 Moore's P. C., 170.

<sup>3</sup> 1778, reported in Cooke's Bankruptcy Law, 5th Ed., 565.

<sup>4</sup> Cooke's Bankruptcy Law, 5th Ed., 580.

in the hands of a broker having no lien upon them, to whom the bankrupt was indebted, and a loss happened after the bankruptcy, the broker was permitted to set off his debt against the moneys collected by him on the policies, and in a similar case, *Olive v. Smith*,<sup>1</sup> in 1813, a like decision was reached. In neither of these cases was any reference made to the case of *Ex parte Ockenden*, and in *Olive v. Smith*, Lord Mansfield, commenting upon the authorities and upon the doctrine, made use of the following language :

"The case of *Parker v. Carter* runs upon all-fours with the present case. The cases of *French v. Fenn* and *Ex parte Prescott* are also prodigiously strong. Some of those cases seem to have gone further than the words of the statute would clearly warrant, and say that wherever there is a mutual trust the balance only shall be paid. I should have thought that the words of the statute meant only money transactions; but if the extension of mutual credit be, as it has been contended, a mistaken doctrine, the mistake is so deeply rooted, it having been again and again confirmed, that it would be rash indeed to overturn it; and there is a great deal of justice in the determination, at which, not only the Court of King's Bench, but the Court of Chancery, have arrived on this point. It would be nugatory to put this in a course of further discussion, when every Court should say that the point had been determined again and again: the rule therefore must be discharged."

Just what element of justice the eminent Chief Justice referred to can be inferred only from his use of the term "mutual trust" as implying that the loan had been made to the bankrupt in reliance upon the property left with the creditor as a means of payment. But the facts in the cases cited by him do not justify this assumption, and in the *Deeze* case it is recited that the goods were not delivered to the creditor until after the debt was incurred. In none of the cases is there reference to an understanding or agreement that the debt was to be paid out of the property, or the property applied to the payment of the debt. If such an agreement had existed, then the question would have been one of equitable or actual lien and in the absence of such an agreement, nothing seems to be added to the

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<sup>1</sup>5 Taunt., 56.

thought by using the term "mutual trust" in place of "mutual credit."

Then came the leading case of *Rose v. Hart* (1818), before referred to. In that case the defendant was a fuller who had received cloth from the bankrupt to be dressed. At the date of the bankruptcy there was a debt due to the defendant for other cloth dressed for the bankrupt in addition to the work done upon the particular goods in the defendant's possession. The noticeable feature of the opinion in that case is the effort to reconcile the reported cases upon a common ground without considering the reasons upon which the rule itself could be supported.

Chief Justice Gibbs, after reviewing the decisions, said:

"Whatever I think of the original decision, I could not persuade myself to break in upon a class of cases so long established, and if they could not be supported without carrying the doctrine found in *Ex parte Deese* to its fullest extent, speaking for myself, I should be ready to follow it rather than to overturn all that has been settled upon this subject for such a length of time."

After examining the language of the statute he formulates a rule in the following language:

"Something more is certainly meant here by *mutual credits* than the words mutual debts import, and yet upon the final statement it is indicated merely that one debt shall be set against another. I think this shows that the legislature meant such credits only as must in their nature terminate in debts, as where \* \* \* there is a debt on one side and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts and the words of the statute will in all respects be complied with; but where there is a mere deposit of property without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."

In other words, the mere possession of the bankrupt's property with the power to convert it into money, although unaccompanied by any interest in the property by contract, or otherwise, is declared to be a credit existing at the time of the bankruptcy, because at some future time a sale may be made and the proceeds may be retained by the creditor and a debt thus created, which can be set off against a debt



to the bankrupt. I submit that this conclusion violates the rule of equality of distribution by conferring upon the possessor of the bankrupt's property a priority over general creditors to which he is not entitled by stipulation, or by any equity growing out of an enhancement of the value of the estate, or by any contribution to the estate which he has made in reliance upon the deposit of the property.

*Rose v. Hart*, although tracing its origin, as we have seen, to a misreported opinion, has remained an unquestioned authority in the English courts down to the present time; although there have not been wanting instances in which the courts have departed from the application of the rule while recognizing its authority.

The doctrine of that case was carried to its extreme length in *Easum v. Cato*.<sup>1</sup> The bankrupt shipped goods on his own account, but in the name of the defendant, his clerk, to whom he was indebted. The goods were sold by the merchant to whom they were shipped, and after notice of bankruptcy, he paid over the balance of the proceeds to the defendant, after deducting advances and charges. It was held that the defendant might retain such proceeds against the debt due to him from the bankrupt. It will be observed that the defendant did not have possession of the property at the time of the bankruptcy; he did not have the right to collect the proceeds as against the bankrupt, and, although the merchant was justified in paying them over to him, yet he received them merely as agent for the bankrupt, and, in retaining them, was guilty of a misappropriation. It was thought, however, that the mere possibility that the funds would be paid over to the defendant and retained by him, was a credit of which he was entitled to avail himself by way of set-off at the date of the bankruptcy.

The question then came before Lord Brougham in the Privy Council in the case of *Young v. The Bank of Bengal*.<sup>2</sup> It is not strange that a mind so accustomed to study precedents from the view-point of a parliamentary law reformer should have encountered extreme difficulty in reconciling the authorities upon this subject with an enlightened sense

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<sup>1</sup> 5 B. & Ald., 1861 (1822).

<sup>2</sup> 1836, 1 Moore, P. C., 150; 1 Deac., 622.

of justice. In fact he substantially overruled the previous decisions<sup>1</sup> although appearing to acquiesce in the rules laid down in *Rose v. Hart*. The case was this: Palmer & Co. had borrowed a large sum from the bank, pledging as collateral East India paper, with written authority to sell and apply on non-payment of the loan. They were also indebted to the bank on two promissory notes which were unsecured. Palmer & Co., becoming insolvent, the bank sold the collateral and realized a sum in excess of the loan, which excess they sought to set off against the bankrupt's indebtedness upon the unsecured notes. The set-off was not allowed. The former Chancellor reviewed all the authorities. He pointed out that an application of the securities for any purpose other than that for which they were specifically pledged, would amount to a breach of trust; that it was the duty of the assignee to pay off the loan for the purpose of realizing the surplus for the benefit of the general creditors and that his failure to do his duty ought not to prejudice the rights of the general creditors, and he emphasized the fact that the power of sale could not be exercised until after the bankruptcy, and that therefore no debt could arise against the bank until after the date of the bankruptcy, and that consequently there could be no mutuality of credits existing at that time.

Logically, this disposed of the rule in *Rose v. Hart*, for it demonstrated that there is want of mutuality necessarily in all instances in which the attempt is made to apply that rule. Judge Lowell regards this case as engrafting an exception upon the rule of *Rose v. Hart*. He calls attention to the statement of Baron Parke, who sat in the case, in an opinion given in the later case of *Alsager v. Currie*,<sup>2</sup> in which he explained that Lord Brougham's opinion went upon two grounds; that the deposit was for a particular purpose, and that the assignees were bound to redeem before default; and the eminent American jurist says that the true ground of decision was that the right to sell the bills, and, therefore, to convert the surplus into a debt did not arise in the time of the bankrupt, and the credit could not be created by the neglect of the assignees to redeem at

<sup>1</sup> See *Byles, J.*, in *Naorogi v. The Chartered Bank*, L. R., 3 C. P., 450.

<sup>2</sup> 12 M. & W., 750.

once.<sup>1</sup> He regards the case of the Bank of Bengal as limiting the doctrine of mutual credits to the case where the power of sale can be exercised at the time of the bankruptcy. He, however, fails, as it seems to me, to appreciate the full force of the objection of want of mutuality, for it is apparent that goods cannot form a part of an account as against money items, until they are reduced to money; and at the date of the bankruptcy, by the terms of the proposition in *Rose v. Hart*, the goods, with a power of sale stand upon one side of the account and the money debt upon the other.

It is, therefore, only by a constructive sale of the property that mutuality can be made to exist. But equity should not introduce the fiction of such constructive sale for the purpose of defeating the fundamental principle of equality of distribution which lies at the basis of the bankruptcy law. Hence, even after the goods have been sold equity should regard the proceeds as standing for the goods themselves, and so at no stage of the proceeding will the goods in the eye of the law, be commensurable with the money debt, and hence no mutuality can exist.

The English courts returned to the full force of the earlier decisions in the later cases of *Naorogi v. The Chartered Bank of India*,<sup>2</sup> and *Astley v. Gurney*,<sup>3</sup> although in the latter case, the facts appear to show a power of sale coupled with an interest.

The important point as to the mutuality of the claims which it is sought to set off, in the cases we are considering, is well illustrated in the case of *Ebberle's Hotels v. Jonas*.<sup>4</sup> There the plaintiff, the liquidator of a company in course of winding up, had deposited cigars with the defendant as security for a debt; a small number of the cigars having been sold and the secured debt having been paid, the defendant claimed to hold the remainder of the cigars for a further debt due to him. The plaintiff brought detinue; the defendant pleaded set-off; but the set-off was not allowed. This case differs from some of the preceding

<sup>1</sup> Lowell on Bankruptcy, § 256.

<sup>2</sup> L. R., 3 C. P., 444.

<sup>3</sup> L. R., 4 C. P., 714.

<sup>4</sup> 18 Q. B. D., 459.

cases only in the circumstance that the cigars had not been sold. It was decided after the addition of the words "mutual dealings" to the section of the English Bankruptcy Law on set-offs, so that the words of the statute then read "mutual credits, mutual debts and other mutual dealings." The following extract from the opinion of Lord Justice Fry presents the question of mutuality with distinctness: "It seems plain on looking to the terms of that section<sup>1</sup> that, in order to be within it, the mutual dealings must be such as will result in an account in which sums due on one side may be set off against sums due on the other, and a balance struck. At the time with reference to which the question whether the section applies must be determined, the right of the plaintiff was to a return of the cigars in specie; and as has been already pointed out, it is impossible to bring into an account cigars on one side and a debt on the other, and to strike a balance between them. As matters stood when the point first arose, the terms were incommensurable."

If the cigars had been sold so that the liquidator had been put to his action for the proceeds, as debt or damages, the right of set-off would have existed under the rule in *Rose v. Hart*, which seems to demonstrate the unsubstantial character of the rule, since the mutual rights of the parties at the date of the bankruptcy are thus found to be determined by a subsequent change merely in the form of the property. A feeling of the injustice of this rule seems to have arisen in the mind of Mr. Justice Fry, for in the same opinion from which we have quoted, he said, after stating that the case turned on the form of the action:

"If we had taken a different view of the point on which our judgment turns, I think it would have been necessary very carefully to consider whether Section 38 applies to the case of a specific security given for a specific debt."

The doctrine of *Rose v. Hart* was fully approved and applied in the Court of Appeal in *Palmer v. Day*,<sup>2</sup> Lord Russell writing the opinion. The bankrupt had employed auctioneers to sell certain furniture and also to sell his house. They sold the furniture, but did not succeed in selling the house. The bankrupt sent them pictures which he had bought in at the furniture sale with instructions to

<sup>1</sup> Sec. 38 of the Bkptcy. Act of 1883-90.

<sup>2</sup> 1895, 2 Q. B., 618.

sell them at prices to be approved by him. He was adjudged bankrupt before the sale of the pictures and they were sold subsequently. The trustee brought an action to recover the proceeds against which the auctioneers set off the debt due to them from the bankrupt. The law of the case was stated as follows:

"The defendants were the depositories of the pictures with authority to sell them at approved prices and as auctioneers; they would certainly be entitled to receive for the pictures from the purchasers the amount realized. The authority could have been revoked, but until revoked the deposit with such authority to sell and receive the proceeds constitute, in our opinion, a giving of credit to the defendants. (See *Naorogi v. Chartered Bank*, approved in *Astley v. Gurney*, *ubi supra*.) There was a debt on one side and a delivery of property with directions to turn it into money on the other."

In *Elgood v. Harris*,<sup>1</sup> where the defendants, who were insurance brokers, undertook to set off against claims due to them from the bankrupt salvage which they had collected after the bankruptcy upon losses on policies settled before the bankruptcy, it was held that the set-off could not be allowed, since the moneys so received were part of the bankrupt's estate; the credits therefore were not mutual, the claim of the plaintiff for such salvage being one which first accrued to him as assignee of the bankrupt's estate, while the claim of the defendant was based on a credit given to the bankrupt himself. This case appears to be inconsistent with the recovery in *Easum v. Cato*, *supra*. The last reported case in England bearing on this subject is *In re Daintrey, ex parte Mant*.<sup>2</sup> There, however, although this subject is somewhat debated, the real question was the right to set off sums becoming due on a contract made before the bankruptcy, because contingent in character.

Turning now to the American cases, we shall find that they are few in number and none of them of controlling importance. The first case,<sup>3</sup> decided in 1804, arose under the Bankrupt Act of 1801. At that time *Rose v. Hart* had not been decided, and the authorities mainly relied upon by

<sup>1</sup> 1892, 2 Q. B., 714.

<sup>2</sup> 1900, 1 Q. B. 546.

<sup>3</sup> *Marks v. Barker*, 1 Wash. C. C., 178.

counsel are those cited from Cooke's Bankruptcy, based, as we have seen, upon *In re Deeze*. The case was this: the plaintiff, as assignee in bankruptcy, brought the action to recover the proceeds of the bankrupt's property which the defendants had sold and upon which they claimed to have a lien for advances. It appeared, however, that the lien had been waived and the case was decided as one of set-off. The set-off was allowed, but without citation of authority and without exhaustive consideration. The question was, however, directly before Judge Lowell in *Ex parte Whiting, In re Dow*.<sup>1</sup> In that case it was held that a party who held stock of the bankrupt with a power of sale as collateral security for a certain debt, which was over-due at the commencement of the bankruptcy proceeding, upon exercising his power of sale after the bankruptcy, had a right to retain a surplus arising from the securities by way of set-off on another claim not secured by the collateral.

Judge Lowell there said: "This has been the law ever since the case of *Rose v. Hart*. Before that decision it" (the right of set-off) "was admitted even in cases where there was no power of sale. *Young v. Bank of Bengal* adds this limitation, and this only, that if the right to sell the pledge does not arise until after the bankruptcy, then there is no set-off for the surplus, for the reason that the assignee might redeem instantly before any power existed, and the creditors shall not be prejudiced by any failure of the right to redeem; or to put it in another way, that the rights of the parties are fixed at the date of the bankruptcy."

The plain result of this decision was to give the unsecured creditor, by reason of the bankruptcy, a security which he did not before have, in prejudice to the rights of the general creditors.

In *In re McVay*,<sup>2</sup> when the bankrupts had given to the creditor specific securities to cover two different transactions, he was permitted to apply a portion of the proceeds given to cover one debt upon a deficiency arising upon the other debt.

In *Catlin v. Foster*,<sup>3</sup> the assignee under a general assign-

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<sup>1</sup> 2 Low., 472, Fed. Cas., 17,573.

<sup>2</sup> 13 Fed. R., 443.

<sup>3</sup> 1 Saw., 37 Fed. Cas., 2519.

ment was permitted to set off, against his liability to a trustee in bankruptcy of the assignor subsequently appointed, the proceeds of assigned goods in his hands against moneys due to him for expenses incurred and services rendered as such assignee. The authority of *Rose v. Hart* is relied upon, but the essential element in that case which we have been considering was not present, since if the transactions under the general assignment constituted debts due to and from the bankrupts, it is plain that they were both due before the bankruptcy.

In *Ex parte Caylus*<sup>1</sup> the Court found that the creditor had by contract a lien upon the goods in his possession, although Judge Lowell in that case anticipated what he afterward held to be the law in *Ex parte Whiting, supra*.

The Supreme Court of Massachusetts declined to follow the rule adopted by Judge Lowell in *Ex parte Whiting, supra*, in a case where the question arose between a trustee under a general assignment and the debtor to the assignor,<sup>2</sup> and the same position was taken in a case in insolvency, *Tallman v. New Bedford Five Cent Savings Bank*,<sup>3</sup> although in *Hathaway v. Fall River Bank*,<sup>4</sup> the Court said, that if the property was unconditionally to be turned into money, the set-off might be allowed; it was held, however, that where goods were deposited to be sold only upon default, such right of sale did not constitute a credit, and the default not having occurred before the assignment, the set-off was not allowed.

Judge Holmes in the *Brown* case, above referred to, expresses a doubt as to whether the set-off should not be denied in a case such as that of *Ex parte Whiting*, for the reason that the proceeds of the securities after the payment of the secured debt are held by the debtor to the estate as a trustee, and that a liability growing out of that trust relation could not be brought into mutual account with the debt due to the debtor personally.

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<sup>1</sup> 1 Low., 550 Fed. Cas., 2534.

<sup>2</sup> *Brown v. New Bedford Inst. for Savings*, 137 Mass., 265.

<sup>3</sup> 138 Mass., 330.

<sup>4</sup> 131 Mass., 16.

The question has not been passed upon under the bankrupt law of 1898.<sup>1</sup>

Upon this review of the authorities, we are brought to a comparison of the reasons which may be given in support of and in opposition to the rule recognized by the cases. In support of the rule, it is suggested (1) that the words "mutual credits" ought to be given an extended meaning, because the trustee in bankruptcy takes subject to all equitable rights and defenses, and if no bankruptcy had taken place and the bankrupt's property held by the creditor had been sold, a case of set-off would have arisen, and (2) that there is a fair presumption that the possession of the property with an existing power of sale at the date of the bankruptcy arose out of the mutual confidence reposed by the parties respectively.

On the other hand, the arguments in opposition to the rule are these :

1. By the adjudication in bankruptcy the whole of the bankrupt's property is clothed with a trust for the equal benefit of all his creditors, and any equitable right or defense which would interfere with such equality of distribution must be such as would have been available at the moment of bankruptcy; otherwise, there is lacking the element of mutuality which is essential to set off, since the debt due to the insolvent estate is held in a trust relation, while the debt to the creditor is due individually.

2. The power of sale unaccompanied by an interest in the property is to be regarded as revoked by the bankruptcy, and its exercise thereafter is a wrong to the general body of the creditors which ought not to inure to the benefit of the wrongdoer.

3. Equity ought not to regard the property subject to the power of sale as reduced to money at the date of the bankruptcy, so as to work a mutuality of debts by equitable conversion in violation of the equity of equality under the bankrupt law.

Reduced to its last analysis the question turns upon the point whether the actual or constructive devolution of title to the property of the insolvent impresses it with such a

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<sup>1</sup> See *In re Tacoma Shoe & Leather Co.*, 3 N. B. N., 9; *In re Meyer & Dickinson*, 3 N. B. N., 436.



trust for general creditors that rights of set-off, incomplete at that moment, should not thereafter be allowed. I submit that the property of the insolvent in the hands of a creditor of the estate is instantly, upon the devolution of title, impressed with such a trust, and, since the individual claim of the creditor stands in a different right, there is wanting the mutuality which is essential to the right of set-off.

If these views are correct, we may properly inquire whether, assuming the doctrine of *Rose v. Hart* to be the settled law in England, that rule should be adopted in this country under the present bankruptcy law.

It is true that where English statutes have been adopted into our legislation the known and settled construction of these statutes by the English courts has been considered as incorporated into the law and has been received with the weight of authority. That is true of the Statute of Frauds and the Statutes of Limitations.<sup>1</sup> But the bankruptcy statutes are peculiar at least in this, that they have been enacted at long intervals, during which the English law has been materially amended and its operation materially affected by the decisions of the courts. While, therefore, we may look to the English decisions as guides in construing the statute, it does not follow that in the use of a particular phrase Congress intended that it should have the meaning and the legal consequences attached to it by the English decisions at the date of its enactment by Congress.

We are justified in this position by the language employed by the Supreme Court of the United States in discussing the meaning of the words "mutual debts and mutual credits," under the late bankrupt law. Referring to the section of the Act of 1867 relating to set-off, Mr. Justice Miller, in *Sawyer v. Hoag*,<sup>2</sup> said:

"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it, the debts must be in the same right."

In *Libbey v. Hopkins*,<sup>3</sup> referring to the same section and

<sup>1</sup>*Pennock v. Dialogue*, 2 Peters, 18; *McDonald v. Hovey*, 110 Wall., 630.

<sup>2</sup> 17 Wall., 610.

<sup>3</sup> 104 U. S., 306.

comparing it with that of the English bankruptcy law at the time of the decision of *Rose v. Hart*,<sup>1</sup> Mr. Justice Wood said :

"In our Act the terms 'credits' and 'debts' are used as correlative. What is debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the entire section or its context for extending the term credits so as to include trusts. Generally we know that 'credit' and 'trust' are not synonymous terms, they have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the 20th Section of the Bankrupt Act."

In the case from which the former of these extracts is taken, the attempt was made to set off a debt due by an insolvent corporation to a stockholder against the demand of the Company upon the unpaid subscription of the creditor to the capital stock, and the Court held that no set-off could be allowed, because the debts were not due in the same right; that is, the debt due to the Company for capital stock was impressed with a trust in favor of the whole body of creditors, and, therefore, was in fact a debt due to their representative, whereas, the liability of the creditor was a debt of the Company.

In the case from which the latter quotation is made, moneys had been sent by the bankrupt to the creditor to be applied on account of a mortgage debt; the creditor had failed to so apply them and afterward sought to set them off against a general indebtedness. The Court held that the set-off could not be allowed for the same reason as in the former case, namely, that the debts were not due in the same right; the creditor, having agreed to apply the money on a specific debt, held it in trust for that purpose and could not, by a misapplication of it, create an obligation to his own advantage.

The case of *Sawyer v. Hoag*, *supra*, and other cases to the same effect,<sup>2</sup> proceed upon the theory that the unpaid capital stock of a corporation is a trust fund for the creditors.

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<sup>1</sup> 2 George II, Chap. 2, Sec. 38.

<sup>2</sup> *Scoville v. Thayer*, 105 U. S. 143; *Scamor v. Kimball*, 92 U. S. 362; *Sanger v. Upton*, 91 U. S. 56; *Morgan v. Allen*, 103 U. S. 498; *In re Troy Woolen Co.*, 8 N. B. R. 412; Fed. Cas., 14,203.

But, upon a declared insolvency, all the assets of an insolvent are also a trust fund for creditors.

In England, although on a winding up under the Companies' Act, a debt due to a stockholder cannot be set-off against his liability on unpaid capital stock, in bankruptcy such set-off is permitted.<sup>1</sup> So the Supreme Court has departed in this particular instance from the rule of set-off applied in the English bankruptcy cases. But this instance seems to be of a controlling character, since it places the denial of the set-off upon the trust arising from the declared insolvency, and thereby attaching to the assets of the insolvent.

We pass now to the consideration of another instance in which the doctrine of set-off is applied more extensively in bankruptcy than is permitted in courts of equity in many of the States. It is the rule in the State of New York, and in some other States, that where neither the debt due to nor the debt due from the insolvent has matured at the date of the insolvency, or where only the debt due to the insolvent has matured, no set-off will be allowed. But if the debt from the insolvent has matured, but the debt to the insolvent has not matured, a set off will be permitted.<sup>2</sup>

The equitable consideration which justifies the set-off, when the debt from the insolvent is due, arises from the fact that the debtor to the estate may waive the extended credit and regard the debt from himself to the insolvent as immediately due; and the debt to him being due, there arises the mutuality of obligation which lies at the basis of the doctrine of set-off.<sup>3</sup>

Equity, by compelling a set-off under such circumstances with the consent of the person entitled to the credit, when third persons are not injured, follows the law. But when the debt from the insolvent is not due, no such equitable considerations can be invoked to call for a departure

<sup>1</sup> *In re Auriferous Properties, Lim.* (1898), 1 Chan. 691; *In re Duckworth, L. R.*, 2 Ch. Ap., 578; *ex p. Strang, L. R.*, 5 Ch. Ap. 492.

<sup>2</sup> *Fera v. Wickham*, 135 N. Y., 223; *Matter of Hatch*, 155 N. Y., 401; *Hughitt v. Hayes*, 136 N. Y., 163; *Richards v. La Tourette*, 119 N. Y., 54; *Rothschild v. Mack*, 115 N. Y., 1; *Bradley v. Angel*, 3 N. Y., 475.

<sup>3</sup> *Lindsay v. Jackson*, 2 Paige, 581; *Bradley v. Angel*, 3 N. Y., 475; *Richards v. La Tourette*, 119 N. Y., 54-59; *Fera v. Wickham*, 135 N. Y., 225.

from the rule at law. The doctrine as applied by the New York courts has the support of the decisions in many other States.<sup>1</sup>

But it has long been decided in bankruptcy that a set-off will be permitted where there are mutual debts, although one or both of them is not due until after bankruptcy. And when one debt is due, it has been held to be immaterial whether it was the debt from the bankrupt or the debt to the bankrupt. This rule had its origin in the case of *In re Prescott*,<sup>2</sup> decided by Lord Hardwicke in 1753. In that case the debt of the bankrupt on simple contract was due, but the creditor was indebted upon a bond which would not mature for several years. The set-off was allowed without discussion of the ground of decision, other than the statement that the bankrupt might be considered as giving credit in consideration of the bond. In the next reported case, by Lord Kenyon, in 1791,<sup>3</sup> neither debt was due, and the set-off was allowed upon the authority of *Ex parte Deeze* and *French v. Fenn*, *supra*.

In *Atkinson v. Elliott*,<sup>4</sup> before Lord Kenyon in 1791, there was some consideration of the subject. He said: "I agree to what was said by J. Buller in one of the cases, that where there is a trust between both parties, there is mutual credit." The word "trust" was there employed in the sense of confidence or credit. There was no evidence in that case which would support an express or implied understanding that one debt was to furnish the basis of credit for the other. The case was decided upon the authority of *Ex parte Prescott*, *supra*.

The rule thus became settled at an early date in England, without extended discussion or consideration as far as the reported cases show, and it has continued upon the authority of these cases down to the present time, so that now it may be regarded as unshakable. It is to be noted also that it does not appear from the reported cases that the distinction taken in the New York courts between the right of set-

<sup>1</sup> *Hamer v. Bank of Commerce*, 140 Mo., 225; *Spalding v. Backus*, 122 Mass., 553; *Chapman v. Bank*, 120 Pa. St., 86; *Oatman v. Batavian Bank* 77 Wis., 501.

<sup>2</sup> 1 Atk., 230.

<sup>3</sup> *Smith v. Hodson*, 4 T. R., 211.

<sup>4</sup> 7 T. R., 378.

off, as depending upon the maturity of debts due from and debts due to the insolvent, has ever been discussed.

In this country the English rule has been uniformly applied in bankruptcy.<sup>1</sup> The same rule has been adopted by the courts of a number of States in the administration of insolvent estates.<sup>2</sup>

In the Supreme Court of the United States the precise question here under consideration does not appear to have been determined. The principle of equitable set-offs has been frequently recognized and applied by that Court,<sup>3</sup> but the distinction drawn by the New York courts limiting the right of set-off to the case where the debt from the bankrupt has matured, does not seem to have been directly before the Court in any of the cases in which the right of set-off has been discussed.

The bankruptcy rule is vigorously supported in recent opinions in some of the State courts.<sup>4</sup> The contention is, that the trustee in bankruptcy, or the assignee, under a general assignment succeeds merely to the rights of the debtor, and that every legal or equitable remedy or defense of which a creditor might avail himself as against the debtor, should be equally available against his trustee or assignee. Hence, where the debt to the estate has not matured at the insolvency, the creditor ought not to be compelled to pay it except with the right of set-off, since he could not have been compelled to do so if the insolvency had not occurred. The equitable principle of equality of distribution is necessarily recognized, but it is said that the equity of equality should in such cases yield to the superior equity of the creditor entitled to the set-off.

The answer to this position is, that the reason for the

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<sup>1</sup>*In re City Bank*, 6 N. B. R., 71 Fed. Cas., 2742; *Drake v. Rollo*, 3 Biss., 273, Fed. Cas., 4066; *In re Kalter*, 2 N. B. N., 265, Loveland on Bankruptcy, § 123.

<sup>2</sup>*National Trust Co. v. Bank*, 91 Tenn., 336; *Kent Flower Co., Assignee, v. Bank*, 90 Ky., 225; *St. Paul & M. Trust Co. v. Leck*, 57 Minn., 87; *Thomas v. Exchange Bank*, 99 Iowa, 202; *Barber v. Bank*, 50 Ohio St., 90.

<sup>3</sup>*Carr v. Hamilton*, 129 U. S., p. 259; *Scott v. Armstrong*, 146 U. S., 499; *Yardley v. Philler*, 167 U. S., 344-360; see *Rolling Mills v. Ore & Steel Co.*, 152 U. S., 596, and cases cited, page 616.

<sup>4</sup>*National Trust Co. v. Bank*, 91 Tenn., 336; *St. Paul & M. Trust Co. v. Leck*, 57 Minn., 87.

transfer of title from an insolvent to his assignee or trustee is that the property of the debtor, by virtue of insolvency, has in equity become the property of his creditors. The assignee is primarily, by reason of the insolvency, the representative of the creditors. He takes the assets, to be sure, subject to all legal or equitable claims, rights and defenses which existed at the moment of the transfer of title, but unless the claim or defense was then available, it should not afterward become operative to the prejudice of the trust imposed upon the assets in favor of creditors by the declared insolvency. Hence the right of set-off, unless by such equitable considerations as are present, where the debt from the insolvent is due before the insolvency, should not be made available as against the superior equity of the general creditors.

It will be seen that, although the rule in *Rose v. Hart* is a more marked departure from the principle of equitable distribution than that in the later class of cases which we have been considering, the fundamental distinction is the same in both. The recognition of the trust relation resulting from a declared insolvency destroys the mutuality indispensable to the right of set-off in the cases we have been considering, and it seems that the tendency of the courts is toward a limitation of the rules of set-off which have been built upon the authority of *Rose v. Hart* and *Ex parte Prescott*.

JAMES L. BISHOP.

# COLUMBIA LAW REVIEW.

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CHANGES IN THE COLUMBIA LAW SCHOOL.—Professor John W. Houston has resigned his chair on account of ill health. His retirement is cause for regret throughout the school, and more particularly among the large body of men to whom he has accorded at all times the most generous personal assistance. The Editors of this REVIEW owe Professor Houston an especial debt of gratitude for the readiness with which he has held at their disposal his great learning and quick practical judgment.

Professor Henry S. Redfield, A. M., who will succeed Professor Houston in the Faculty of Law, was born in 1851, graduated from Amherst in the Class of '77, and after twenty years' practice at Elmira became Professor of Practice and Procedure at Cornell in 1898. Professor Redfield will present a course in pleading and practice extending through the three years, which will combine the various subjects properly included under that general head but heretofore taught separately in the school, Wills, the Administration of Estates and some work in Surrogate's Practice.

The first-year class next fall will have an election between the regular course in Criminal Law and a new course offered by Professor Burgess on American Constitutional Law in its Historical Development. The latter course is intended as an introduction to the second-year courses in constitutional law, to which next year Professor Burgess will add a course devoted to the study of private rights under the Constitution of the United States, as expounded by judicial decision.

The course in Bailments and Carriers will be given by Mr. Harlan F. Stone.

## NOTES.

**DIVORCE—RECENT DECISIONS OF THE SUPREME COURT.**—On the fifteenth of April the Supreme Court of the United States handed down several decisions involving the interstate validity of divorces procured by constructive service of process. In two of these cases, *Bell v. Bell*, 157 N. Y., 719 (1899), and *Streitwolf v. Streitwolf*, 58 N. J. Eq., 563 (1899), the evidence clearly showed that neither party had ever acquired a *bona fide* domicile in the State in which the decree pleaded had been procured. To affirm the decisions of the State courts holding these decrees void for want of jurisdiction it was necessary only to apply the doctrine—well settled since the case of *Thompson v. Whitman*, 18 Wall., 457 (1873)—that the “Full Faith and Credit” clause of the United States Constitution does not preclude one from impeaching a judgment of another State by showing to be untrue the facts upon which the courts of that State based their jurisdiction.

In *Atherton v. Atherton*, the wife sued in New York for a limited divorce on the ground of cruelty. The husband appeared and pleaded an absolute divorce procured by constructive service in Kentucky (where he had always resided) on the ground of desertion. The New York Court found that the wife was justified in leaving her former home in Kentucky, had acquired in good faith a separate domicile in New York, and under the rule laid down in *People v. Baker*, 76 N. Y., 78 (1879), held that the decree of the Kentucky Court was invalid as to her for want of jurisdiction, since she had not been personally served and had not appeared in the suit. *Atherton v. Atherton*, 155 N. Y., 129 (1898). This decision is reversed by the Supreme Court (PECKHAM, J., and FULLER, C. J., dissenting) in an elaborate opinion by Mr. Justice GRAY, holding that due credit had not been given to the Kentucky decree. The Court does not controvert the common law rule which allows a married woman on account of ill treatment to acquire a domicile apart from her husband. After an exhaustive review of the American cases holding that where husband and wife are domiciled in different States a decree procured by constructive service of process by either is extra-territorially valid as to both, and after due reference to the opposing decisions in New York and in two other States in which it is held that such decrees, though valid as to the petitioner, are wholly ineffectual to change the matrimonial status of the non-resident, the Court declares that the principal case does not involve a determination of this perplexing question. “The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonished us to confine our decision to the exact case before us.” It is submitted that the principal case



does necessitate a settlement of the problem referred to above, and that the decision is not to be supported on the ground taken by the Court.

The Court says: "The husband always had his domicile in Kentucky, and the matrimonial domicile of the parties was in Kentucky." [On this state of facts the case would be on all fours with *Cheeley v. Clayton*, 110 U. S., 701 (1884), where a husband, domiciled in Colorado, obtained a divorce there on constructive service against his wife, then in Illinois, for unjustifiably refusing to live with him].

Finding that the constructive notice required by the statutes of Kentucky was duly given, the Court declares that the decree of the Court there, granted for desertion, is binding on Mrs. Atherton, and "binding her to that full extent, it established *beyond contradiction*, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment." The Kentucky decree is binding on Mrs. Atherton if the Kentucky court had jurisdiction over her, but not otherwise, and jurisdiction in divorce proceedings is based on the domicile of the parties. The right to contradict the facts on which the courts of another State have based their jurisdiction in rendering a judgment cannot be questioned; for the Supreme Court reaffirmed this doctrine, announced in *Thompson v. Whitman*, *supra*, on the very day the opinion in the principal case was handed down. *Bell v. Bell*, *supra*. Hence, Mrs. Atherton was entitled to disprove the finding of the Kentucky tribunal to the effect that she had unjustifiably left her husband. Having established the fact of his abusive treatment, and the consequent right on her part to maintain a separate domicile, it follows that the contention of the Court that "the matrimonial domicile of the parties was in Kentucky" is wholly untenable. Nevertheless, it is upon this proposition that the Court bases its decision. The parties being domiciled in different States the question whether or not the Kentucky decree, granted on constructive service, is binding on Mrs. Atherton necessarily involved the adoption or the repudiation of the rule of the New York courts. If, in determining the jurisdiction of a court in another State to grant a decree of divorce, inquiry into the domicile of the parties may be made when it is claimed that neither person resided in that State (*Bell v. Bell*), but is refused in a case where it is admitted that the libelant was a *bona fide* resident (*Atherton v. Atherton*), the logical result is that if one party is domiciled in a State, the courts of that State have sufficient jurisdiction to determine the status of both parties—the very proposition denied in New York.

Although the Court, as quoted, expressly declines to pass upon this question, the reader has only to compare three extracts from the opinion in order to satisfy himself as to the views actually entertained by the Court of last resort. After reviewing a great number of cases representing the general law, Mr. Justice GRAY says: "In New York, North Carolina, and South Carolina, the

opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libelee from the bond of matrimony," citing *People v. Baker*, 76 N. Y., 78 (1879), and other cases. In the first part of the opinion, the Court, citing *Pennoyer v. Neff*, 95 U. S., 714 (1877), effectively disposes of the first contention, saying "The rule as to notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*"; while in another portion, the second contention is thus dismissed: "The marriage tie, when thus (lawfully) severed as to one party, ceases to bind either. A husband without a wife or a wife without a husband is unknown to the law."

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PASSENGER ELEVATORS—*RES IPSA LOQUITUR*.—The recent decision of the Court of Appeals in the case of *Griffen v. Manice*, 59 N. E., 925 (1901), New York Law Journal, March 22, 1901, raises the question of the application of the principle *res ipsa loquitur*, and of the liability of an operator of a passenger elevator. The facts were briefly these: The elevator in which the plaintiff's intestate was riding fell suddenly to the bottom of the shaft; a moment later the counter balance weights fell through the top of the elevator and instantly killed him. The Appellate Division sustained the ruling of the trial Court—that the jury might infer negligence from the accident, and that as to the appliances by which the elevator was controlled, the defendant's duty was similar to that of a common carrier. The Court of Appeals affirmed the first proposition, but held that the defendant was bound only to use a degree of care commensurate with the dangerous character of the service.

In applying the principle *res ipsa loquitur* the Court repudiates a suggestion formerly made in this State and to some extent acted upon, that it should be confined to those cases in which the relation of passenger and common carrier exists, or in which there has been an interference with the safety of a public highway. *Cosulich v. Standard Oil Co.*, 122 N. Y., 118 (1890). Undoubtedly the principle is most frequently applied to cases of railway accidents, for if it appears that the accident resulted from a defect in the vehicle or road-bed, it may be reasonably presumed that the carrier was at fault, since it is hardly conceivable that a defect can exist which extreme care aided by science and skill is incapable of detecting. *Curtis v. Ry Co.*, 18 N. Y., 534 (1859); *Seybolt v. Ry Co.*, 95 N. Y., 562 (1884). And it has been established by precedent that the falling of objects into a highway from a building, if unexplained, is *prima facie* evidence of negligence. *Byrne v. Boadle*, 2 H. & C., 722 (1863); *Mullen v. St. John*, 57 N. Y., 567 (1874). But there is no reason for limiting the principle to these cases. For it is primarily the nature of the accident which gives rise to the presumption, and the relation of the parties, or the particular place where

the casualty occurs so far from being an essential element, is important only, on the one hand in that it makes out a clearer case; on the other, in that the inference has been allowed in similar cases. In short, whether or not the principle is applicable is a question of fact for the court sitting as a jury to decide upon. Therefore, no hard and fast test can be laid down. It may be said, however, that if the evidence in a given case goes to show that in the nature of things the accident would not have occurred if the defendant had exercised proper care, the court, as in the principal case, is justified in permitting the jury to infer negligence from the fact of the accident viewed in the light of the surrounding circumstance. *Scott v. London Dock Co.*, 3 H. & C., 596 (1865). But if the evidence is conflicting and is as consistent with the hypothesis of due care as with that of negligence, the Court should not allow the inference to be drawn. *Millie v. Manhattan R'y Co.*, 5 Misc., 301 (N. Y., 1893).

Upon the question of liability the conclusion reached by the Appellate Division seems to be more expedient and to conform better with the present needs of society. For although an elevator operator is not technically a common carrier, yet the considerations of public policy which require extraordinary diligence of the latter, would seem to require a similar degree of diligence of the former. In each case the passenger's safety depends wholly upon the operator's vigilance; in each case the probability of a serious accident, unless extraordinary vigilance is exercised, is imminent. The objection that an elevator operator receives no compensation for the carriage is met by the fact that he receives adequate compensation, indirectly at least, from the rent paid by the tenants. In several jurisdictions the question has been decided in favor of the view here contended for. *Oberfelder v. Doran*, 41 N. W., 1094 (Neb., 1889); *Goodsell v. Taylor*, 42 N. W., 873 (Minn., 1889); *Treadwell v. Whittier*, 22 Pac., 266 (Cal., 1889); *Marker v. Mitchell*, 54 Fed. Rep., 637 (1893); *Kentucky Hotel Co. v. Camp*, 30 S. W., 1010 (Ky., 1895); *Southern B. & L. Association v. Lawson*, 97 Tenn., 367 (1896); *Ripland v. Hirschler*, 7 Pa. Super. Ct., 384 (1898). The recent case of *Springer v. Ford*, 59 N. E., 953 (Ill., 1901), extends the liability to the operator of a freight elevator.

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**BANKRUPTCY—EXEMPTIONS.**—The Bankruptcy Act of 1898 does not disturb the law of the State as to a debtor's exemptions. Section 6. *In re Ogilvie*, 5 Am. B. R., 374 (South. Dist. Ga., 1901). The trustee, in succeeding to the bankrupt's property, does not take title to specific exempted property. Section 70a. *In re Hester*, 6437 Federal Cases (Dist. Ct. N. C., 1871), 46 N. Y., 36; *Schlitz v. Schatz*, 12,459 Federal Cases (Dist. Ct. Misc., 1870). But as to those articles from which a debtor is entitled to select exemptions, the trustee takes title subject to defeasance by the bankrupt's selection. Consequently the administration of exempt property does not fall within the jurisdiction of the bankruptcy court. *Woodruff v. Cheeves*, 5 Am. B. R., 296 (C. C. A. Ga., 1901); *In re Haich*, 4

Am. B. R., 349 (South. Dist. Iowa, 1900); *In re Wells*, 5 Am. B. R., 308 (Dist. Court Ark.) Since exemption is a personal privilege of the bankrupt or, in some cases, of his family, failure to exercise this privilege throws the whole estate into the bankruptcy court for administration. *In re Mayer*, 15 Fed. R., 598 (Dist. Ct. Pa., 1883). *Woolfolk v. Murray*, 44 Ga., 133 (1870). When, however, the bankrupt has waived this privilege only as to certain of his creditors, he is in effect insisting on it as to the rest, and thereby giving a lawful preference to those for whom he has waived it. It is as though he had first reserved his exemptions as against all creditors, and then given claims against this property to certain creditors.

A recent case, *In re Follett*, 5 Am. B. R., 305 (Dist. Court Tenn., 1900), held that a debtor who had fraudulently transferred property could later take an exemption out of it, when it was returned to the trustee, on the ground that the trustee takes title by Section 70a (4) to all fraudulently conveyed property, and hence, the fraudulent transfer was a waiver of exemptions. The element of actual fraud was eliminated from the case by the higher court. *In re Follett*, 5 Am. B. R., 404 (C. C. A., 6th Circ., 1901). Even so the decisions seem to uphold exemptions so long as the rights of a third party have not intervened. *In re Boothroyd*, 1652 Fed. Cases (Dist. Ct. Mich., 1876). *Brackett v. Watkins*, 21 Wendell, 68 (N. Y., 1839). That the trustees' taking title is no bar in itself to the bankrupt's later claim to exemptions is shown by the fact that even after the adjudication, at any time before a discharge, the bankrupt may amend his schedules and insert exemptions. *In re Kean*, 7630 Fed. Cases (Dist. Ct. Va., 1873). Consequently, the single fact that property was once transferred by the bankrupt, but later comes to his trustee, especially when the bankrupt himself has caused its return, and succeeded in exculpating himself of all color of fraud, should not suffice to bar his right to exemptions out of the property, *In re Follett*, 5 Am. B. R., 404 (C. C. A., 6th Circ., 1901).

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TRUSTS—CHARITABLE BEQUESTS IN NEW YORK.—The recent case of *Racine v. Gillet*, N. Y. Law Journal, March 30, 1901, raises the question how far the Laws of 1893 (Chap. 701) have restored the English doctrine of charitable trusts in this State. It was there held by a referee that a bequest, "For the poor of New York," created a charitable fund, to be administered by the Supreme Court for the benefit of the poor; that it was not void for indefiniteness of beneficiaries, and not within the rule against perpetuities. This decision follows *Allen v. Stevens*, 161 N. Y., 122 (1899) even to the extent of the *dictum* of PARKER, C. J., that charitable trusts form an exception to the rule against perpetuities (1 COLUMBIA LAW REVIEW, 225). It is in line with the English doctrine that a charitable trust shall not fail for indefiniteness of beneficiaries, and that where there is no *cestui que trust* to come into court, the Attorney-General is to take measures to have the trust enforced. *Attorney-General v. Gleg*, 1 Atk., 356 (1738); *Mog-*

*gridge v. Thackwell*, 7 Ves., 36 (1802). But that doctrine went further for, where the object of the trust was so indefinite that it could not be executed by a decree in chancery, the king or the chancellor by virtue of the royal prerogative delegated to him by sign-manual, approximated the intention of the testator and determined for what purposes the trust fund should be applied in accordance with that intention—a rule known as that of *cy près*. It is said that the English doctrine of charitable trusts was shaken by the decision of LORD ELDON in *Morice v. Bishop of Durham*, 10 Vesey, 521 (1805), but that case seems to have been decided on the ground that the objects of the testator did not come under the head of "charities," as defined in the Statute of 43 Eliz., C. 4, and hence, was not to be governed by the laws regulating charitable uses and trusts. The decision is inconsistent with the later case of *Musset v. Bingle*, Weekly Notes (1876), 170, and is open to criticism (5 Harv. L. Rev., 389). The Supreme Court of the United States has decided that the *cy près* rule does not apply here, as there is no judicial officer vested with the required prerogative, *Fontain v. Ravenel*, 17 How., 369 (1854), but several of the States, notably Rhode Island, uphold the doctrine. *Rhode Island Hospital Trust Co. v. Olney*, 14 R. I., 449 (1884).

In New York the English doctrine was held to apply to cases of charitable trusts in *Shotwell v. Mott*, 2 Sand. Ch., 49 (1844), where it was said that the statutes of New York govern private trusts only. Then came *Williams v. Williams*, 8 New York, 525 (1853), which met the objection that the statute of Elizabeth had never been adopted in this country, by saying that this statute had not created the law of charitable trusts, but merely codified it and created new remedies. The decision, however, limited the English doctrine, in that it held, like the case of *Fontain v. Ravenel* (*supra*), that the rule of *cy près* had no place in our law.

From about the year 1856 on, the courts refused to recognize the validity of charitable trusts, holding them void for indefiniteness of beneficiaries, and within the rule against perpetuities, *Owens v. Missionary Society*, 14 N. Y., 380 (1856). DENIO, J., who wrote the opinion in *Williams v. Williams*, concurred on the ground that the trust could have been sustained only by invoking the rule of *cy près*. SELDEN, J., page 387, seems to have taken the ground that the statute of Elizabeth was embraced in the general repeal of English statutes in 1788. But see DENIO, C. J., at page 411. The case was followed in many decisions, of which the leading ones are *Levy v. Levy*, 33 N. Y., 97 (1865); *Holmes v. Mead*, 52 N. Y., 332 (1873), and *Tilden v. Green*, 130 N. Y., 29 (1891).

Many valuable bequests to charity having failed, the Legislature passed a law, providing that a gift, bequest or devise to charity, otherwise valid under the laws of New York, shall not be deemed invalid because of indefiniteness of beneficiaries; that the Attorney-General shall represent the beneficiaries, and, if no trustee is named, title to the property shall vest in the Supreme Court (Laws of 1893, Chap. 701). In the recent case of *Allen v.*

*Stevens (supra)*, this statute was interpreted as restoring the law as laid down in *Williams v. Williams*, thus returning to the English doctrine. The principal case, in addition, intimates that the Supreme Court is by the new law vested with the power of *cy prés*, but this is quite unnecessary to the decision.

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CORPORATIONS—ISSUING STOCK BELOW PAR.—In *Donald v. American Smelting and Refining Co.* (N. J. Eq., 1901) an action was brought to enjoin the defendants from entering into a contract with M. Guggenheim's Sons, whereby the latter were to receive an issue of new stock of the defendant company to the value of \$45,000,000 in return for \$12,000,000 cash and the Guggenheim smelting plants, which had an estimated value exclusive of good-will of eight to ten millions. The New Jersey Corporation Act (P. L., 1896, p. 277) provides, § 49: Any corporation formed under the Act may purchase necessary property and "issue stock to the amount of the value thereof in payment therefor." The Court of Errors and Appeals reviewing the decision of *STEVENS, V. C.*, granted the injunction. The statute did not permit the issue of stock below par, and although it declared that in the absence of fraud the judgment of the directors as to the value of the property should be final, this latter applied only to a case where the stock had already been issued. When the question is one of *prevention* and not of *remedy*, the court will enjoin an issue below par, notwithstanding the *bona fides* of the directors. The fact that the contract of purchase was advantageous and caused a rise in the market value of the stock was immaterial, as was also the fact that the comparative values of the plants showed that the purchase might have been for the full market value of the stock issued.

In comparison with the New Jersey statute and the foregoing decision, it is interesting to note the New York law. Section 42 of the Stock Corporation Law as amended 1901 is substantially as follows: "No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation"; stock may be issued to the amount of the necessary property bought, and "in the absence of fraud the judgment of the directors shall be considered conclusive." The Act of 1901 omits the former clause, stating that no stock shall be issued for less than its par value. In *Van Cott v. Van Brunt*, 82 N. Y., 535 (1880), the question being as to the liability of shareholders knowingly receiving the stock in payment for work done at a market valuation much below par, the court held that the issue being at the actual value of the stock the defendants were not liable. (See criticism in Morawitz on Corporations, § 826.) In *Gamble v. Queens County Water Co.*, 123 N. Y., 91, it was held that an issue below par could be enjoined. The case was distinguished from the previous one because of a different wording of the manufacturing statute, although the fact that the case was one of prevention and not of remedy would seem to have been sufficient

ground of distinction. It will be interesting to see what interpretation the courts will put upon the new statute in New York. The Legislature has evidently intended to reinstate the decision of *Van Cott v. Van Brunt*, but the wording of the statute is not more favorable to that ruling than is the wording of the New Jersey statute under which, in the principal case, an injunction was granted.

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## RECENT DECISIONS.

**BANKRUPTCY—ACT OF BANKRUPTCY—CONCEALMENT.** An absconding debtor who takes with him property not exempt from his creditors is *held* guilty of a concealment and of a removal of property with intent to defraud, creditors. *In re Filer*, 5 Am. B. R. 332 (South. Dist. N. Y. 1900).

It is clear that the debtor has committed an act of bankruptcy within Section 3, clause 1. But it may be material to distinguish between a concealment and a removal or transfer of property. The former is a continuing act, and affords ground for an involuntary petition so long as the concealment continues; the latter is generally a single act, which to afford such ground, must have been done within four months prior to the filing of the petition. This distinction is well taken by GROSSCUP, J., in *Citizens' Bank of Salem v. DePauw Co.*, 5 Am. B. R. 345 (C. C. A., 7th Circ. 1901). Concealment may of course be effected by such a fraudulent transfer or removal as would only cover or mask the debtor's title or interest, in which case there would not be a real divestiture of title or interest of the debtor.

**BANKRUPTCY—EXEMPTIONS.** The bankruptcy court is *held* to have no power under the Act to protect or to enforce the rights of creditors against the bankrupt's exempt property, although the bankrupt has waived his exemptions as regards particular creditors. *Woodruff v. Cheeves*, 5 Am. B. R. 296 (C. C. A., 5th Circ. 1901). See NOTES.

**BILLS AND NOTES—VARYING OR CONTRADICTING TERMS—PAROL EVIDENCE.** Where the defendant, the maker of a promissory note, had entered into a prior parol agreement with the plaintiff, payee, "that in no event should he ever be called upon, to pay in money, any part of the note sued upon." *Held*, that this parol agreement could not be given in evidence, to vary or contradict the terms of the note. *Garneau v. Cohn*, 85 N. W. 531 (Neb. March, 1901).

The decision reached in this case is strictly in accord with the rule prohibiting the admission of parol agreements to vary or contradict the terms of a written instrument. *Gerner v. Church*, 43 Neb., 690 (1895); *Quinn v. Moss*, 45 Neb. 614 (1895), etc. But it would seem that the note in question was, as between the parties, to serve only as a memorandum showing the amount of indebtedness, and hence, this evidence formed an exception to the general rule. For it is generally held that where the defendant wished to show that the contract sued upon is not the one into which he entered, *i. e.*, that there is, in effect, no contract, such evidence is admissible. *Pike v. Street*, *Moody & Malkin*, 226 (1828); *Watkins v. Bowers*, 119 Mass. 383 (1876); *Norman v. Waite*, 30 Neb. 302 (1890); *Witherow v. Slayback*, 158 N. Y. 649 (1899). But some jurisdictions have adopted a contrary view, adhering strictly to the parol evidence rule. *Mason v. Burton*, 54 Ill. 349 (1870); *Holton v. McCormick*, 45 Ind. 411 (1873); *McLanagan v. Hines*, 2 Strobb. 122 (S. Ca. 1847).

**CONFLICT OF LAWS—TORTS—TELEGRAMS—MENTAL ANGUISH.** The defendant, having agreed with the plaintiff in Arkansas to transmit and deliver a telegram to a point within that State, failed to do so and thereby caused the plaintiff mental anguish. By the laws of Arkansas no damages are allowed in an action for mental anguish alone. The plaintiff sued in Texas, where such damages are usually allowed. *Held*, plaintiff could not recover. *Thomas v. West. U. Tel. Co.*, 61 S. W. 501 (Tex., Feb., 1901).



This decision is not to be taken as a modification of the law of Texas, that its courts allow damages for mental anguish alone when such anguish is caused unlawfully within its own territory, but as a recognition of the doctrine that in some instances damages pertain primarily to one's right, not to one's remedy.

If the plaintiff had any cause of action in tort in Arkansas (a point which is not made plain in the opinion), the decision may be questioned, *Wooden v. Railroad Co.*, 126 N. Y. 10 (1891); but it would appear both sound in principle and supported by the weight of authority. *Ry. Co. v. Jackson*, 89 Tex. 107 (1896); *Railroad Co. v. Babcock*, 154 U. S. 190 (1893). If the plaintiff had no cause of action in Arkansas, the decision is undoubtedly correct. *La Forest v. Tolman*, 117 Mass. 109 (1875).

CONSTITUTIONAL LAW—PUBLIC CONTRACTS. One Treat performed work for the City of New York under a contract containing a clause following the statute (Laws 1897, C. 415) which provided that the City should be freed from all liability under the contract, if the contractor in the course of performance should use any stone dressed outside of the State. *Held*, the statute was unconstitutional and the clause inoperative. *People ex rel. Treat v. Coler*, 59 N. E. 776 (N. Y. March, 1901).

The question whether a statute regulating in detail the contracts of a city for proper public works is unconstitutional was elaborately discussed in the case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1; which is followed in this decision. See also 1 COLUMBIA LAW REVIEW, 315. The present Court further holds that the "Dressed Stone" Statute is unconstitutional as usurping the right of Congress to regulate interstate commerce. Admitting this, it was proper to take out of the contract a clause inserted in compliance with the statute. *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211. But the point is a close one and the principal case, although undoubtedly the present law, is chiefly interesting as showing the attitude of the New York Court of Appeals toward certain recent socialistic tendencies of the Legislature.

CONSTITUTIONAL LAW—POLICE POWER—LICENSES. *Held*, a statute requiring the owners of all grain elevators, where grain is bought and weighed, to procure a license and pay a fee does not contravene the Fourteenth Amendment, being an exercise of the police power. *Cargill Co. v. Minnesota*, 21 Sup. Ct. Rep. 423 (March, 1901).

While it would seem that the decision cannot be questioned, the case is nevertheless interesting in view of the fact that the plaintiff neither stored nor shipped grain for other persons. The argument of the Court in *Munn v. Illinois*, 94 U. S. 113 (1876), where the right to regulate elevator storage rates was involved, does not therefore apply. The ground of the decision is that an elevator is "a sort of public market," even though used for storing only the owner's grain, and therefore it is within the police power of the State to require a license for purposes of regulation, and to protect the public against imposition and fraud. The case illustrates what is really a working principle of the Court that when a statute is directly connected with the social order of the State, it will be upheld unless it plainly violates the Federal Constitution. *Plumley v. Mass.*, 155 U. S. 461 (1894).

CONTRACTS—ACCOUNT STATED. Plaintiff was the receiver of a corporation of which defendant had been president. The evidence showed that the bookkeeper under the defendant's direction had kept a personal account with the defendant; that the defendant in the petition for dissolution included this item as an asset of the corporation. The trial Court held as a matter of law that no account was stated. *Held*, error. *Spellman v. Muchfeld*, 59 N. E. 81 (N. Y., March 1901).

The holding of the lower courts was properly reversed. There must be a mutual examination of claims and a mutual agreement to an account settled, but these may be implied. *Lockwood v. Thorne*, 18 N. Y. 285 (1858). Whether an account presented in evidence is an account stated is a question for the jury. *Davis v. Tiernan*, 3 Miss. 786 (1838); *Robbins v.*

*Downey*, 16 N. Y. Supp. 205 (1891); *Nostrand v. Dilmis*, 28 N. E. 27 (N. Y. 1891); *Rosenfeld v. Fortier*, 94 Mich. 29 (1892).

CONTRACTS—CONDITIONS PRECEDENT—NON-PERFORMANCE—DEFENDANT IN DEFAULT. Where defendant, an ice manufacturer, contracted to furnish plaintiff with ice from his surplus product, so as not to interfere with other prior agreements, *held*, lack of surplus due to defendant's failure to put his machines in order was no defense to an action for non-delivery. *Richmond Ice Co. v. Crystal Ice Co.*, 38 S. E. 141 (Va., March, 1901).

It might be contended here that defendant never parted with his volition, that he was under no obligation to manufacture any ice, that there was no contract. *Cf. Taylor v. Brewer*, 1 Maule & Selwyn 290 (K. B. 1813). The decision proceeds, however, upon the theory that the parties intended a contract, and that defendant's factory was to run and produce ice. Even in this view, the existence of a surplus was a condition precedent to defendant's liability. It is universally acknowledged that where non-performance of a condition precedent is due to defendant's act or default he shall not be relieved from liability. *Williams v. Lloyd*, W. Jones, 179 (K. B. 1664); *Camp v. Barker*, 21 Vt. 469 (1849).

In *Navigation Co. v. Wilcox*, 7 Jones L. 181 (N. C. 1860), and in *Jones v. Walker*, 13 B. More, 163 (Ky. 1852), defendant's liability depended upon a decision favorable to him in certain suits then pending. He compromised the suits. The courts in each case held plaintiff might recover without showing performance of the condition. These two decisions would seem to cover the principal case.

CONTRACTS—CONSIDERATION—BENEFICIARIES. Where defendant promised A to deliver lumber to plaintiff, who later paid A \$250 for the order containing the promise, *held*, the payment by plaintiff to A was a good consideration for defendant's promise. *Elmer v. Loper*, 48 Atl. 550 (N. J., March, 1901).

Certainly a detriment suffered by the *promisee*, if at the request of the promisor, is a good consideration. But the authorities do not support the doctrine here laid down, that a detriment suffered by a beneficiary, *i. e.*, a third person, without request by the promisor, and without his knowledge, is a good consideration. Chitty on Contracts, 10th Am. Ed., p. 27; 1 Parsons on Contracts, 7th Ed., p. 431; *Gordon v. Dalby*, 30 Ia. 223 (1870); *Barnes v. Perine*, 9 Barb. 202 (N. Y. 1850); *Kempton v. Coffin*, 12 Pick. 129 (Mass. 1831).

*Walker v. Sherman*, 11 Met. 170 (Mass. 1846), cited by the Court in support of its view, is plainly distinguishable. In that case, it is true, plaintiff sued defendant on his acceptance of an order. But at the time of the acceptance the three parties were together, and in consideration of plaintiff's forbearance to sue the drawer on an existing debt, defendant agreed to deliver the goods.

It would seem that here there was a good bilateral contract between defendant and the promisee A, and in that view of the case plaintiff might have recovered, as being the beneficiary. 1 Parsons on Contracts, page 469.

CONTRACTS—CONSIDERATION. A debtor upon a final judgment, recovered by an infant, instituted further suits to determine the rights of various claimants of the judgment. *Held*, in an action to set aside a release of the judgment given by the infant's curator for less than the amount due on the judgment, the discontinuance of those suits was no consideration for the release. *Winter v. Kansas City Ry. Co.*, 61 S. W. 606 (Mo. June, 1900).

It would be difficult to support this case upon legal principles. While it is true that payment of part of a liquidated sum is no consideration for a release of the whole [*Jaffray v. Davis*, 124 N. Y. 164 (1891)], it is also unquestionable that the discontinuance of suits instituted in good faith is a consideration for such a release. *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (1870); *Grandin v. Grandin*, 49 N. J. L. 508 (1887); *Good Fellows v. Campbell*, 17 R. I. 402 (1891). The defendant in the

principal case had instituted the proceedings in good faith, and there seems to be no valid reason for the decision that the discontinuance of such suits is no consideration.

**CORPORATIONS—ISSUING STOCK BELOW PAR.** Defendant directors proposed to issue \$45,000,000 stock to M. Guggenheim's Sons in exchange for cash and property worth not more than \$24,000,000 exclusive of goodwill. *Held*, the issue could be enjoined at the instance of a minority stockholder, as the New Jersey statute allows stock to be issued only to the amount of the value of the property purchased. *Donald v. American Smelting & Refining Co.* (N. J. Eq. 1901). SEE NOTES, p. 402.

**CONSTITUTIONAL LAW—LEGISLATIVE CONTROL OVER CONTRACTS—LABOR LAW.** The labor law (L. 1897, c. 415; am'd L. 1899, cc. 192, 567), provided that all contracts to perform public work should contain a stipulation that the contractor or sub-contractor should pay his laborers the prevailing rate of wages in the locality where the work was done, or else forfeit all right to recover any compensation for work performed. *Held*, the statute was unconstitutional, (a) under Art. 8, § 11, of the State constitution, which provided that no city, town, etc., pay out money except for a city purpose; (b) as imposing a forfeiture on the contractor whenever he should exercise his right of contracting freely with laborers, thus depriving him of his liberty (State Const., Art. I., secs. 1 and 6; U. S. Const., Amdt. XIV., sec. 1). *People ex rel. Rodgers v. Coler*, 59 N. E. 716 (N. Y.), Feb. 26, 1901. SEE NOTES, p. 315.

**DOMESTIC RELATIONS—DIVORCE—CONFLICT OF LAWS—VALIDITY OF FOREIGN JUDGMENTS—SUBSTITUTED SERVICE OF PROCESS.** Plaintiff sued for divorce in the state where she resided. Her husband appeared and pleaded a decree of divorce obtained by him in another state by substituted service of process. The evidence showed that the husband had never acquired a *bona fide* domicile in the State in which his judgment was rendered, and that the wife had never lived there. *Held*, the decree is void, the court granting it having been without jurisdiction. *Bell v. Bell*, 157 N. Y. 719 (1899), *affirmed on appeal*; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563 (1899), *affirmed on appeal*: U. S. Supreme Court, April 15, 1901. SEE NOTES, p. 396.

**DOMESTIC RELATIONS—DIVORCE—CONFLICT OF LAWS.** Plaintiff sued in New York for a limited divorce, alleging cruelty on the part of her husband. The defendant, a resident of Kentucky, appeared and set up a decree of absolute divorce procured in that state by constructive service, on the ground of desertion. The court found that the wife had been compelled to leave her husband because of his abusive treatment, and had acquired in good faith a separate domicile in New York. *Held*, the Kentucky decree is void as to the wife for want of jurisdiction, since she had not appeared in the suit and had not been personally served with process. *Atherton v. Atherton*, 155 N. Y. 129 (1898), *reversed on appeal*; U. S. Supreme Court, April 15, 1901. N. Y. Law Journal, Apr. 17, 1901. SEE NOTES, p. 396.

**DOMESTIC RELATIONS—INFANCY—FRAUDULENT MISREPRESENTATION AS TO AGE.** Plaintiff sued to recover possession of land purchased by his grantor from an infant, relying on the latter's affidavit that he was of full age. On attaining majority, the vendor claimed the right to disaffirm and gave defendant a deed for the property. *Held*, the defendant has no title, the infant having been estopped by his fraud to disaffirm his first conveyance. *Damron v. Commonwealth*, 61 S. W. 459 (Ky., Mar. 1901).

This ruling by a court of law is an unusual one, it being generally held that an infant's right to avoid his contracts cannot be taken away because of any act on his part while still under age. On principle, the defrauded adult should be allowed to recover in an action for deceit, but in many jurisdictions such an action cannot be maintained, on the ground that, in effect, it would amount to allowing an enforcement of the con-

tract. Courts of equity have sometimes invoked the doctrine of estoppel. *Overton v. Bannister*, 3 Hare 503 (1844). In the principal case, the court based its decision on the case of *Schmitheimer v. Eiseman*, 7 Bush 298 (Ky., 1870), which was a suit in equity to set aside a deed. In Texas the theory of estoppel is applied at law in these cases. *Kilgore v. Jordan*, 17 Texas 341 (1856). Under the civil law an infant is bound absolutely by his fraudulent contracts, and in Iowa this rule has been adopted by statute. *Prouty v. Edgar*, 6 Iowa 353 (1858).

EQUITY—PURPRESTURE—MAY BE ABATED, THOUGH NOT A NUISANCE. Where defendant, not a riparian owner, built a boat house and pier in the shallow waters of a navigable lake, in no way obstructing navigation, *held*, such structures are illegal as invasions of the public domain and should be abated. *Attorney-General v. Smith*, 85 N. W. 512 (Wis., March, 1901).

A purpresture is any encroachment on public rights, not necessarily a nuisance (Gould on Waters, 3 ed., § 21). Where it amounts to a nuisance, public or private, the jurisdiction of equity has never been questioned, but a doubt seems to have arisen as to the abatement of a purpresture, which does not amount to a nuisance. In California, the court has held that equity has no jurisdiction and that the parties must proceed at law, *People v. Davidson*, 30 Cal. 379 (1866), but the general view is *contra*, holding that courts of equity have such jurisdiction, chiefly because of the inadequacy of a suit at law. *People v. Vanderbilt*, 28 N. Y. 396 (1863); *People v. Staten Island Ferry Co.*, 68 N. Y. 71 (1877); *Revell v. People*, 177 Ill. 468 (1899).

INSURANCE—FORFEITURE—WAIVER. An adjuster, expressly stating that he did not waive breach of condition of occupancy, required the insured to make out a list of destroyed property and left without claiming forfeiture. The insured then went to expense in preparing proofs of loss. *Held*, the forfeiture was waived. *Germania-American Ins. Co. v. Evans*, 61 S. W. 536 (Civ. App., Texas, 1901).

In *Phoenix Ass. Co. v. Mfg. Co.*, 49 S. W. 271 (1898), a policy containing the stipulation that "the company shall not be held to have waived \* \* \* any forfeiture thereof by any requirement \* \* \* relating to appraisal, etc., was held to give a right of election to the company, and its acts with full knowledge of breach of condition would bind it to its position. The principal case logically follows,

In New York after *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410 (1880), the above stipulation was generally made a part of the policy and was incorporated in the standard policy. It is doubtful if any change was made, however (see *Gibson El. Co. v. Liverpool & L. & G. Ins. Co.*, 159 N. Y. 418 (1899), and cases discussed). If an appraisal is proper in any event, the insurer, though requesting it, does not assume a position inconsistent with its right to take advantage of a breach, *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190 (1896), and mere inaction of insurer is an insufficient basis of a waiver, *Gibson El. Co. v. Liverpool & L. & G. Ins. Co.*, *supra*. The prophecy in § 163, Richards, Insurance, seems wrong.

INSURANCE—PROOF OF LOSS—MAILING. Under a condition in policy requiring statement of proofs of loss to be "rendered" within sixty days, insured mailed proofs on the sixtieth day, which were received after expiration of conditional time. *Held* (3 dissenting), that depositing of proofs in mail was not compliance with provisions of policy. *Peabody v. Satterlee et al.*, 59 N. E. 818 (N. Y. 1901).

In the words "render a statement to attorneys," the Court finds a clear intention to furnish personally to the defendants proofs of loss. The decision seems correct. On a like state of facts in *Hodgkins v. Mut. Ins. Co.*, 34 Barb. 213 (1861), it was held that under a condition to "deliver in a particular account," there must be actual delivery. The case was reversed in 41 N. Y. 620 (1869), whether on this point or not is not evident. A condition to "make a representation to the company" has been given a like

construction. *Plath v. Ins. Co.*, 23 Minn. 479 (1877). In *Susquehanna Mut. Ins. Co. v. Toy Co.*, 97 Pa. 424 (1881), is found an intention of actual delivery of proofs of loss with a *dictum* that notice of loss merely requires diligence. Cf. *Woods, Ins.* (2d Ed.) 942-3. *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389 (1889), has a *dictum* opposed to principal case. Such notice is clearly distinguishable from notice as an implied condition for the convenience of the party to be bound. Langdell, *Contracts*, § 6.

QUASI CONTRACTS—RECOVERY OF MONEY PAID IN MISTAKE OF FACT—CERTIFICATION OF DRAFT—NEGLIGENCE. Where the plaintiff certified a draft which had been raised, although at the time a letter notifying it of the amount was on the bookkeeper's desk, and the defendant, relying on the certification, paid over the money, *held*, the plaintiff could not recover because of its negligent act on which defendant had relied. *Continental Bank of N. Y. v. Tradesmen's Bank of N. Y.*, 69 N. Y. Supp. 82 (Sup. Ct. Ap. Div., March, 1901).

Generally, money paid in mistake of fact may be recovered, even though plaintiff's mistake was due to negligence, *Kelly v. Solari*, 9 Meeson & Welsby 54 (1841); *Appleton Bank v. McGilvray*, 4 Gray 518 (Mass., 1855). And the rule seems to apply although the defendant has relied on plaintiff's negligent act. *White v. Continental Bank*, 64 N. Y. 317 (1876). By certifying the check, the bank admitted and guaranteed only that the drawer had funds in the bank and that his signature was genuine. *Marine Bank v. Nat. City Bank*, 59 N. Y. 67 (1874); N. Y. Negotiable Instruments Law, § 323 (General Laws of 1897, Chap. 612). The principal case was decided on the analogy of *Clews v. Bank*, 114 N. Y. 70 (1889), where the draft was raised after certification and inquiry was made of the certifying bank before it was honored. The court held that the bank could not recover, because it knew the amount of the draft and was culpably negligent in not referring to its register. The facts in the principal case are distinguishable. The draft was raised before certification and no further inquiry, the basis for the decision of *Clews v. Bank* (*supra*), was made; nor was there any order to stop payment of the draft, another point on which the *Clews* case was decided.

REAL PROPERTY—ADVERSE POSSESSION—SUCCESSIVE OCCUPANTS—TACKING. Where the successive grantees of a lot have occupied a strip of plaintiff's adjoining land for more than twenty years in the aggregate, though none of the deeds included said strip, *held*, the right of the owner of the record title was barred by the statute of limitations. *Wishart v. McKnight*, 59 N. E. 1028 (Mass., April, 1901).

This case would seem to establish a new rule in Massachusetts, departing from the doctrine of *Sawyer v. Kendall*, 10 Cush. 241 (Mass., 1852), though the court purports only to "limit" that case to the point decided. In that case the court held that "several consecutive" adverse "possessions, cannot be tacked so as to make a continuity of disseisin of sufficient length of time to bar the true owner's right of entry. \* \* \* There must have been a privity of estate between the successive disseisors; \* \* \* some such relation as that of ancestor and heir, grantor and grantee, deviser and devisee." This was not *dictum*. It is clear that in the principal case there is no such privity. Nor is the fact that in *Sawyer v. Kendall*, the second disseisor was the wife of the first, or the kind of act relied on to prove the disseisin, granted that there was one, ground of distinction, though the court seems to think otherwise. If in the latter case the seisin descended to the heir or that of the true owner revived, how in the principal case did it pass to the subsequent grantees?

Further, it does not appear that the case of *Overfield v. Christie*, 7 Serg. & R. 173 (Pa. 1821), on which the court relies as showing that there was no authority on which to base *Sawyer v. Kendall* decides anything, save that a claim to land maintained for less than the statutory period is transferable by *deed* or *will*.

There are authorities in accord with the principal case. *Fannon v. Wilcox*, 3 Day 269 (Conn. 1808), [limited somewhat by *Smith v. Chapin*,

31 Conn. 530 (1863)]; *Shannon v. Kinny*, 1 Marsh. 4 (Ky., 1817), [though the opposite result was reached in *Winn v. Wilbite*, 5 Marsh. N. S. (Ky., 1834)]; *McCoy v. Dickenson College*, 5 Serg. & Rawle 254 (Pa., 1819); *McNeeley v. Langam*, 22 Ohio St. 32 (1871).

The New York rule, and the general doctrine is that of *Sawyer v. Kendall*. *Smith v. Reich*, 80 Hun, 287 (N. Y., 1894); Angell on Limitations, 6th ed., §§ 413, 414; Tyler on Ejectment and Adverse Enjoyment, p. 914; *Riggs v. Fuller*, 54 Ala. 141 (1875).

**REAL PROPERTY—CONTRACT OF SALE—INFANCY—ADVERSE POSSESSION.** An infant made a parol sale of land, gave possession and received the purchase price; he also signed a bond to make a deed when he came of age. *Held*, the vendee's possession was adverse, being that of a vendee under an executed contract of sale. *Ogle v. Hignet*, 61 S. W. 596 (Mo., March, 1901).

The use of the term executed contract here is unfortunate, for the reason that with respect to the vendor's promise, the contract was in fact unexecuted. In saying that as the vendee had fully performed his part of the contract the contract had become executed and that, therefore, he was an adverse possessor, the court reaches a correct result; but its language is ambiguous. If a contract is said to be unexecuted, one may be misled, as the plaintiff was here, in supposing that it is wholly unexecuted, whereas in fact it may be wholly performed on one side.

Had the court said the plaintiff could not recover because the vendee was in possession under a unilateral contract, no misunderstanding could arise; for it is only when a vendee is in possession under a bilateral contract that he cannot be said to hold adversely. *Adair v. Adair*, 78 Mo. 630 (1883). At least without some unequivocal and positive action to indicate such a purpose. *Hannibal & St. Jo. R. Co. v. Miller*, 115 Mo. 158 (1893).

**REAL PROPERTY—COVENANTS AGAINST INCUMBRANCES—REMOTE GRANTEE.** A deed contained a covenant against incumbrances. The land at the time was subject to a local assessment, and thereafter was conveyed subject to the assessment. *Held*, such conveyance broke the continuity of the of the covenant and a subsequent grantee under a deed containing the covenant against incumbrances cannot recover on it as against the original grantor. *Geissler v. DeGraaf et al.*, 59 N. E. 993 (N. Y., March, 1901).

The grantee of land conveyed subject to an assessment or other incumbrance is presumed to deduct the amount of the assessment from the purchase-price. Therefore he and his grantees have no right of action on any covenant against incumbrances in a deed by a previous grantor. *Vrooman v. Turner*, 69 N. Y. 280 (1877).

The present case is interesting, chiefly because the court took occasion to review previous conflicting decisions and declare that "the covenant against incumbrances attaches to and runs with the land, and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered." This ruling, though strictly only a *dictum*, will probably settle that question in New York. It is in line with the general tendency of decisions and enactments. The opposite view which prevailed at common law was based on the non-assignability of choses in action. Since choses in action are now assignable in New York, this doctrine should not survive the reason on which it was founded, and there are decisions in the lower court declaring that it does not. *Coleman v. Bresnahan*, 54 Hun, 619 (1889); *Clarke v. Priest*, 47 N. Y. Supp. 489 (Sup. Ct., App. Div. 1889).

**REAL PROPERTY—DRAINAGE OF OIL LANDS—DAMAGES.** Where A leased two adjoining tracts of oil land from different parties, B and C, agreeing to pay a royalty on all the oil produced, and then sank a well on C's land only, intending to drain and in fact draining the oil from B's land. *Held*, in equity, B is not entitled to the royalties on all the oil produced, on the theory of confusion of goods, but only on the proportion of oil, to

the whole amount produced, which the area of his land so drained bears to the land drained in the other tract. *Kleppner v. Lemon*, 48 Atl. 483 (Sup. Ct. Pa., March 25, 1901).

Cases relating to oil and natural gas necessarily involve difficult and uncertain points, for although both are minerals, because of their peculiar attributes, as the subject of property, they differ from other minerals, and the term "minerals *feræ naturæ*," used by MITCHELL, J., in *Westmoreland Co. v. De Witt*, 130 Pa. 235 (1890), illustrates their nature. Thus, until the owner of the land has actually reduced the oil into his possession he has no exclusive property right in it, and if an adjoining proprietor by sinking a well in his own land draws off the oil, the owner of the drained land has no remedy. *Achison v. Stevenson*, 146 Pa. 239 (1891); *Brown v. Spilman*, 155 U. S. 665 (1895). This result is in accord with the doctrine as to percolating water, *Acton v. Blundell*, 12 M. and W. 324 (1843), and has been followed in Vermont, even in the case of malicious interception. *Chatfield v. Wilson*, 28 Vt. 49 (1855). In view of this doctrine, where oil lands are leased in consideration of a royalty, the law implies a covenant on the part of the lessee to work the lands properly and with due diligence so that the lessor should not sustain loss by the operations of adjoining proprietors. *Brown v. Vandergrift*, 80 Pa. 142 (1875); *Koch's Appeal*, 93 Pa. 434 (1880). It seems from an earlier report, *Kleppner v. Lemon*, 176 Pa. 502 (Sup. Ct., 1896), that the lessee (A), in the principal case had forfeited his lease; but it is not shown in the present report whether the lessor is trying to obtain damages for the breach of the implied covenant to work the lands properly and with due diligence, or is attempting to get satisfaction for the oil willfully drained from his land. If the lessor's action is on the implied covenant, the measure of damages ought to be determined in a more accurate way, for the relative areas of the two tracts show nothing as to the amount of oil lying under the surface. In a question of so uncertain a nature, the measure of damages laid down in *Bradford Oil Co. v. Blair*, 113 Pa. 83 (1886) seems preferable. The court there decreed that a master should ascertain how much more oil the plaintiff ought to receive, over and above what he had received, deducting from this the cost of producing what ought to have been produced. So here, an estimate of the amount of oil lying under the lessor's land should have been made and the royalties allowed on that quantity only. But if the lessor is attempting to get satisfaction for the oil drained from his land, it seems doubtful whether he has any right to recover. For the cases of *Achison v. Stevenson* and *Brown v. Spilman* (*supra*), hold that the owner of the soil has no such property right in oil, before it is reduced to possession as to be able to bring trover for it, if it is drained off through the land of another. As the action was in equity, the court might, however, have given damages for the fraud practiced on the plaintiff. (See *Law of Mines and Mining in the U. S.*, Barringer & Adams, ed. 1897.)

**REAL PROPERTY—HIGHWAYS—NEW USER.** Judgment was sought declaring unconstitutional an act authorizing side paths on roads, for the use of bicycles. Refused. *Ryan v. Preston*, 69 N. Y. Supp. 100 (March, 1901).

This is an application of a recognized principle to new facts. Mr. Justice MITCHELL states the doctrine clearly in *Cater v. N. W. Tel. Exch.*, 63 N. W. 111 (Minn. 1895), namely that methods though not within the contemplation of the original dedication, if within the general purpose of that dedication, impose no additional burden. This is the principle of *Palmer v. The Larchmont Light Co.*, 158 N. Y. 231 (1899) which does not conflict with *Eels v. The Am. Tel. Co.*, 143 N. Y. 133 (1894).

The use in the principal case is not comparable to a use by a railroad company for its road bed.

**REAL PROPERTY—LANDLORD AND TENANT.** Where a tenant sub-let the premises with the lessor's permission, and, owing to the sub-lessee's refusal to quit, the tenant was unable to surrender possession at the expiration of the lease, *held* the landlord may hold the tenant for another

year's rent, because the failure to deliver up the premises was the tenant's fault. *Sullivan v. G. Ringler & Co.*, 69 N. Y. Sup. 38 (March, 1901).

It is well settled in New York that a tenant who holds over may be liable either as a trespasser or tenant for another year. *Schuyler v. Smith*, 51 N. Y. 313 (1873). The rule has been strictly applied, no exception being made in case of an involuntary holding over. *Haynes v. Aldrich*, 133 N. Y. 287 (1892), where it was held that the presence of a sick boarder in the house who could not be removed with safety was no excuse. In *Herten v. Mullen*, 159 N. Y. 28 (1899), however, the rule was relaxed, where it was held that involuntary holding over, if caused by act of God or inevitable accident, will not render the tenant liable for another year's rent. Obviously, the principal case did not fall within this exception.

**SALES—UNPAID VENDOR—PASSING OF TITLE—NOTICE TO SUB-VENDER.** Contractors agreed to build a house for the defendant and bought materials from the plaintiff. When the house was partly completed and some of the lumber still unused lay on the property, the building contract was rescinded by mutual agreement, the defendant buying of the contractor this building material. *Held*, the plaintiff, the materialman, having given notice to the defendant that he was unpaid, could recover for the materials so used. *Rosenbaum v. Carlisle*, 29 So. 517 (Miss., March, 1901).

It is difficult to see how the notice given could have such effect. The fact that the contractors had not paid for the material did not necessarily prevent title passing. Benjamin on Sales, page 299, and cases there cited. By all the facts that appear the lumber was sold and delivered, and the purchase-price is being sued for. The contractors, then having title, sold to the defendants. The plaintiff had his action against the contractors for goods sold and delivered, but certainly not against the present defendant. Though not the better doctrine, there is authority for the view that in a "cash" sale, title does not pass even by delivery unless the price is paid. *National Bank v. Chicago, Burlington and N. Ry. Co.* 44 Minn., 224 (1890); *Empire State Founding Co. v. Grant*, 114 N. Y. 40 (1889).

Nothing is shown as to the terms of this sale. If the notice given was for the purpose of preventing the passing of title, this suit against the defendant should have been in replevin or for conversion.

**STATUTES—DOCUMENTARY EVIDENCE—REVENUE STAMPS.** *Held*, the United States Internal Revenue law of 1898 forbidding the use of certain documents as evidence in any court unless bearing revenue stamps, affects their use in the Federal courts only. *Watson v. Mirike*, 61 S. W. 538 (Tex., Feb., 1901).

The question here presented has not yet been answered by the Supreme Court of the United States. Until it has been, it must remain an open one. It is worthy of note, however, that the holding above agrees with the holdings of nearly all the States upon the somewhat similar internal revenue laws of 1864 and 1866. *Clemens v. Conrad*, 19 Mich. 170 (1869); *Griffin v. Rauney*, 35 Conn. 239 (1868); *Latham v. Smith*, 45 Ill. 29 (1867); and is in accord with the construction already put upon the present law by the courts of two States. *Cassidy v. St. Germain*, 46 Atl. 35 (R. I., 1900); *Small v. Slocum*, 37 S. E. 481 (Ga., 1900).

**TORTS—CIVIL ACTION FOR FELONY—DUTY TO PROSECUTE CRIMINAL.** The plaintiff sued to recover damages for felonious assault. The defendant pleaded in abatement that an indictment for the felony was still pending and undetermined against him. *Held*, the plaintiff having made her complaint and appeared before the grand jury was entitled to maintain this action. *McBlain v. Edgar*, 48 Atl. 600 (N. J., Mar., 1901).

In England, an old rule of the common law precludes the institution of a civil suit against a defendant for a tort which is also a felony, until the plaintiff has prosecuted the criminal offense to conviction, acquittal or a termination of the criminal proceeding by some judicial act. *Stone v. Marsh*, 6 B. & C. 551 (1827). Though the American courts are unani-



mous in refusing to apply the full English doctrine, there is a wide diversity of opinion as to how far the principle should be carried. In some States the rule has been repudiated at common law; in others it has been abrogated by statute. One jurisdiction limits it to such felonies as are punishable capitally, another to offenses which were felonies at common law. Mr. BISHOP says that the true rule is believed to be that the party may institute the proceeding for damages as promptly as he chooses, only he must not bring on the trial in advance of his public duty. *New Crim. Law*, § 272.

**TORTS—DEATH OF A MINOR—RIGHT OF ACTION.** *Held*, "no action at common law by a father lies for the instantaneous death of a minor son." *Bligh v. Biddeford & S. R. Co.*, 48 Atl. 112 (Me. Jan. 1901). The case is a good illustration of the barbarous rule of the common law that *actio personalis moritur cum persona*. Statutes similar to Lord Campbell's Act (9 and 10 Vict. c. 29), which modified the rule in England, and allows a recovery in a case like that above, have been passed in most of our States; but in the absence of statute, or in such a case as the present where the action is not brought under the statute passed, the common law rule still prevails. "*The Harrisburg*," 119 U. S. 199 (1886); *Moran v. Hollings*, 125 Mass. 93 (1878); *Goodsell v. Hartford & N. H. R. R.*, 33 Conn. 51 (1865). *Ford v. Munroe*, 20 Wend. 210 (1838), which is cited as holding the contrary, was practically overruled by the N. Y. Court of Appeals in *Green v. Hudson River R. R. Co.*, 2 Keyes, 294 (N. Y., 1866).

**TORTS—MASTER AND SERVANT—FELLOW-SERVANTS.** Through the negligence of railway company's section foreman in performing his duty, which was to control the brakes of a hand car for the transportation of section hands, the plaintiff, a section hand, was thrown from the car and injured. *Held*, the railway company was liable, on the ground that the foreman was not a fellow-servant, but a vice-principal. *Ill. Cent. Ry. Co. v. Josey's Adm'x*, 61 S. W. 703 (Ky. Nov. 1900).

The exact relation existing between the railway company and the foreman is not clearly stated. But assuming that it was that ordinarily existing between such parties, the decision is against the great weight of authority. *Lochbaum v. Oregon Ry. & Nav. Co.*, 104 F. R. 852 (Wash. 1900) and *Railroad Co. v. Gaun*, 47 S. W. (Tenn., 1898) are, as to their facts, on all fours with the principal case and both are *contra*.

The Court was evidently misled by the fact that the foreman was the superior of the section hand; but, in the absence of evidence showing that the foreman was a direct representative of the railway company in performing the act which occasioned the injury, this fact was immaterial. *Crispin v. Babbitt*, 81 N. Y. 576 (1880); *Rodgers v. Ludlow Mfg. Co.*, 144 Mass. 198 (1887); Pollock on Torts (N. Y., 1895), 67; Cooley on Torts (Chicago, 1880), 542-545.

**TORTS—NEGLIGENCE—PASSENGER ELEVATORS—RES IPSA LOQUITUR.** Plaintiff's intestate was killed by the fall of a passenger elevator in which he was riding. *Held*, the jury might infer negligence from the fact of the accident and the attendant circumstances, and that defendant, who owned the elevator, was bound to use a degree of care commensurate with the dangerous character of the service. *Griffin v. Manice*, 59 N. E. 925 (N. Y., 1901). SEE NOTES, p. 399.

**TORTS—NEGLIGENCE—FREIGHT ELEVATORS—RES IPSA LOQUITUR.** Plaintiff was injured by the fall of a freight elevator in which he was riding. *Held*, A presumption of negligence arose from the fact of the accident, and that defendant was bound to a carrier's liability in respect to the apparatus employed. *Springer v. Ford*, 59 N. E. 953 (Ill., 1901). SEE NOTES, p. 399.

**TORTS—MASTER AND SERVANT—MEASURE OF DAMAGES.** Plaintiff was injured through his employer's negligence; *Held*, evidence as to the size of the plaintiff's family and their dependence on him was admissible as tending to prove loss of capacity to meet obligations imposed upon

him by law. *Youngblood v. South Carolina & G. R. Co.*, 38 S. E. 232 (S. C., March, 1901).

Two cases are cited by the Court as authority for this decision—*Johns v. Railroad Co.*, 17 S. E., 698, and *Maltus v. Railroad Co.*, 31 S. E. 240. Neither of these cases, however, is in point. In the former the Court denied an exception based on the admission of similar evidence, on the ground that in that particular case it was wholly immaterial and could not have influenced the verdict. In the latter case a similar exception was overruled because the defendant company had itself introduced evidence on the same point in cross-examination.

If there is little authority for this ruling in law it would seem that there is still less reason for it in principle. The necessary decrease in the plaintiff's earning capacity is the correct measure of damages in such cases, *Rooney v. Railroad Co.*, 53 N. E. 435,—not, as the principle case seems to indicate, the probable amount of his expenditures.

**TRUSTS—CHARITABLE BEQUESTS IN NEW YORK—LAWS OF 1893.** *Held*, by a referee, that a bequest of one thousand dollars "For the Poor of New York" is a charitable fund to be used for the benefit of the poor. It is not void for indefiniteness of beneficiaries, is not within the rule against perpetuities, and is to be administered by the Supreme Court. No appeal was taken. *Racine v. Gillet*, N. Y. Law Journal (N. Y. Supr. Ct., March 30, 1901). SEE NOTES, p. 400.

**TRUSTS—RIGHTS OF CREDITORS UNDER "SPENDTHRIFT'S" TRUSTS.** Defendants as trustees were under the duty of applying the income of the trust estate to the support of the beneficiary, having great discretion as to the amount to be so applied and the investment of the surplus. *Held*, they were liable to the extent of the income, for necessary medical services rendered by the plaintiff to the beneficiary at his request. *Sherman v. Skuse et al.*, 59 N. E. 990 (N. Y., March, 1901).

It is well settled that the maker of a spendthrift trust may, either by terms or by implication, prevent creditors of the beneficiary from acquiring any right against the *res* in satisfaction of their claims. *Seymour v. McAvoy*, 53 P. R. 946. The Court recognizes this rule and expressly disclaims any intention of overriding it. The decision is based on the peculiar state of facts in the present case. The plaintiff's claim was undoubtedly meritorious. There was no explicit finding that the trustees had themselves furnished proper medical attendance, and this, by the terms of the trust, they were bound to do. The Court seized upon the maxim, "Equity looks upon that as done which should be done," and considered the services as necessities furnished to the beneficiary with the trustees' consent. While justice was undoubtedly done, the case may be viewed with suspicion, as lending itself too readily to improper citation.

**WILLS—PRESENCE OF WITNESSES.** Witnesses signed in an adjoining room, but the testatrix could have seen them by rising in bed, and was conscious of all that was said and done, though she was unable to raise herself. *Held*, the witnesses subscribed in her presence. *Raymond v. Wagner*, 59 N. E. 811 (Mass., March, 1901).

Mr. JARMAN, in his treatise on the law of wills, at page 89 declares such a subscription invalid, but cites only one case. The opinions in *Downie's Will*, 42 Wis. 66 (1877) and in *Chase v. Kittredge*, 11 Allen 61 (Mass., 1865), show that those courts held the same view, though those cases are distinguishable from the principal case. American authorities are hopelessly at variance, as shown by a note to *Mandeville v. Parker*, 31 N. J. Eq. 242 (1879). In *Cunningham v. Cunningham*, 83 N. W. 58 (Minn., 1900), and *Hopkins v. Hopkins*, 45 Atl. 551 (R. I. 1900), the testator could have seen, but did not, and the subscription was held valid. *Riggs v. Riggs*, 135 Mass. 238 (1883), and *Cook v. Manchester*, 46 N. W. 106 (Mich., 1890), distinguishing *Aiken v. Weckerly*, 19 Mich. 482 (1870), are strictly in accord with the principal case. Ordinarily the ability to see witnesses is the best test of their presence, but it would not be applicable in case of a blind testator. This is a similar case. But for a physical infirmity the testatrix could have seen what took place and a reasonable application is given to the statutes.

## BOOK REVIEWS.

POLITICS AND THE MORAL LAW. By Gustave Ruemelin, late Chancellor of the University of Tübingen. Translated from the German by Rudolf Tombo, Jr., Ph. D., Columbia University. Edited with an Introduction and Notes by Frederick W. Holls, D. C. L. New York: The Macmillan Co. 1901. pp. 125.

This excellent translation of Dr. Ruemelin's address of November 6, 1874, the birthday of King Frederick of Württemberg, the admirable introduction by Dr. Holls, and the notes on the provocation of war, treaties, and the morality of war, altogether make up an interesting and useful handbook of political ethics. Doubtless each generation will continue to discuss the question, "Is politics, *i. e.*, the untrammelled practice of public affairs subject to the moral law, or does it follow laws of its own?" Yet, perhaps, no generation is likely to make a more searching examination of Machiavellism than has been made by men whose memories go back to the Napoleonic era and cover the administrative activity of Bismarck. More illuminating examples of the practical difficulties of living up to an ideal standard of truth and justice in statecraft or diplomacy are not likely to be offered than those which have been created since the Congress of Vienna; and saner or more well-informed discussions in the philosophy of public morals can hardly be looked for than one finds in the writings of John Stuart Mill, John Morley, Robert Von Mohl and Louis Proal. If these examples and discussions have contributed nothing to the solution of the problem stated in Ruemelin's question above quoted, the final solution must be indeed far off, or even doubtful.

Dr. Ruemelin's address itself, while broad-minded and suggestive, can hardly be regarded as profound. It states clearly enough the alternatives, and defends the position that while "the very highest sense of moral obligation is enjoined upon the statesman, the content of his duties is not thereby prescribed." But it does not reveal a penetrating insight into the reasons for an undoubted difference between the concrete content of private morality and the concrete content of public ethics. It abounds in too many assertions for which no adequate justification is offered; as, for example, this: "It would, however, be quite as illogical as it is impracticable to demand from the community itself the same course of action or omission as from its members." That such a course would be impracticable most sensible men are willing to grant. That it would be illogical they do not so clearly see, and what they most of all desire to learn from writings like Dr. Ruemelin's is just why the impractical is also, in derivation from accepted ethical postulates, illogical.

Frankly, we must say that Dr. Ruemelin has not satisfactorily met this desire.

As much as this is by implication confessed when with Dr. Ruemelin's paper are combined Dr. Holls' introduction and elaborate notes, all of which have obviously been added because without them to address itself would be both incomplete and weak. Much the best material in the volume is found in the long quotations from John Stuart Mill's Essay on "Treaty Obligations." Here we feel the grip of a master mind, and know that we are being brought face to face with discriminations that go deep down into the principles of human nature and the practical conditions of existence.

In fact, it is in two famous rules laid down by Mill, that we find the most valuable suggestions ever made toward the reconciliation of public policy with the requirements of abstract morality. "Nations," he said, "should abstain from imposing conditions which, upon any just and reasonable view of human affairs, cannot be expected to be kept, and they should conclude their treaties as commercial treaties are usually concluded, only for terms of years." From these two rules a fairly complete and, we think, a sound philosophy of political morality could be developed. Morality is a quality of unconstrained conduct. It cannot be predicated of acts which are performed under duress or necessity. It is, therefore, a mere jugglery with words to talk about the morality or the immorality of wars which, in view of the struggle for existence and the imperfections of human nature, are practically inevitable. Only those acts which needlessly and wantonly provoke war can be condemned. In like manner, since growth and development from generation to generation are normal processes, it is inevitable that inconsiderate promises binding future generations shall from time to time be broken. They should never have been made; but if they have been made under compulsion, the nation that has exercised the compulsion is in no sense a mentor of righteousness, but only an ordinary fool, if it expects the promises to be fulfilled. All such promises fall within one general class of non-moral cases, namely, those in which a wrong act is so bound up with a right act that in order to do right it is necessary at the same time to do wrong. To break promises is *ipso facto* wrong, but to arrest development or curtail the liberty of others is also *ipso facto* wrong. Logically, all such cases drop out of the category of voluntary acts, and, therefore, of morality, and take their place in the category of necessity.

We could wish that Dr. Holls had included in his full and illuminating notes citations from Proal's "*La Criminalité Politique*," a translation of which appeared in this country in 1898—a thoughtful work, defending the authority of abstract moral principle.

THE CLERK'S AND CONVEYANCER'S ASSISTANT: A COLLECTION OF FORMS OF CONVEYANCING, CONTRACTS AND LEGAL PROCEEDINGS. By Benj. V. Abbott and Austin Abbott. Second Edition. Revised

and enlarged by Clarence F. Birdseye, of the New York Bar. New York: Baker, Voorhis & Company. 1899. pp. 1061.

Since Abbott's "Clerk's and Conveyancer's Assistant" was published in 1866, many of its forms have become obsolete through change of business conditions and methods, judicial decisions, or legislation. Lawyers will consequently welcome this second edition, revised and enlarged by Mr. Birdseye, who has omitted obsolete forms and those which arise under codes of procedure and which properly belong to works on pleading and practice. He has also omitted forms relating to the formation and government of corporations, which are governed by specific statutes in the various States and cannot be covered by a general book of forms; and has added forms of corporate mortgages and traffic, underwriting, reorganization and similar agreements, which are now so large a part of ordinary practice.

This book, like the other works of the late Messrs. Abbott, is not, and does not purport to be, a scientific treatise, but is an instrument or tool to aid the busy lawyer in the drawing of papers. If treated as such, and used with a knowledge of the decisions and statutes covering the particular state of facts, it will be of very great assistance. A word of caution against blindly following a form would be out of place if careless lawyers did not sometimes sacrifice the substance of the particular needs of their clients to the form in the book, by inserting in documents provisions which have nothing to do with, or are contrary to, such needs.

The publisher's work is well done, and the full index will be of great service.

A BRIEF FOR THE TRIAL OF CIVIL ISSUES BEFORE A JURY. By Austin Abbott. Second and Enlarged Edition by the Publishers' Editorial Staff. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1900. pp. xiii, 603.

The first edition of this useful work for the trial lawyer came out in 1885, and this second and enlarged edition will be heartily welcomed on account of the development in trial practice since then. The work does not deal with the science, but with the practical mechanics of a lawsuit. But the lawyer cannot, in justice to his client, disregard this side of the practice of his profession. Everyone who has followed the history of lawsuits knows that often, even under our modern practice, a good cause is jeopardized or lost because the right motion or objection was not made at the right time and in the right way. The original edition was chiefly for the New York lawyer, and he may at first find the greater size of the second edition inconvenient, but he will be more than compensated by the references to the decisions of other jurisdictions, which throw light on undecided, doubtful or disputed questions. Comparatively few changes have been made in the arrangement or in the text of the first edition, but other and important subjects have been added, such as the examination of witnesses, the impeachment and corroboration of witnesses, the absence of the judge and

his improper conduct, and the verdict and its incidents. In addition, the treatment of the subject of exceptions has been greatly enlarged. This new work has been carefully done. The utility of the work is enhanced by its convenient arrangement and clear, attractive typography.

Reviews to follow:

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

PROBATE REPORTS ANNOTATED. Vol. IV. New York: Baker, Voorhis & Co. 1900. pp. xxxiii, 767.

AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION. By John S. Ewart, Esq. Chicago: Callaghan & Co. 1900. pp. xlvii, 548.

A SELECTION OF CASES ON THE LAW OF INSURANCE. Edwin H. Woodruff. New York: Baker, Voorhis & Company. 1900. pp. xiii, 591.

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Francis Newton Thorpe. Chicago: Callaghan & Co. 1901. pp. Vol. I, xxi, 595; Vol. II, xix, 685; Vol. III, xvi, 718.

A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING, with notes. By Charles M. Hepburn, of the Cincinnati Bar. Cincinnati: W. H. Anderson & Co. 1901. pp. xxxvi, 651.

A TREATISE ON CANADIAN COMPANY LAW. By W. J. White, Q. C., assisted by J. A. Ewing, B. C. L. Montreal: C. Theoret. 1901. pp. xxiii, 708.

DIGEST OF THE CODE OF CIVIL PROCEDURE. Being a synopsis of the Code. By Charles W. Disbrow, of the New York Bar. Albany: Matthew Bender. 1901. pp. 151.

FALSTAFF AND EQUITY: An interpretation. By Charles E. Phelps. Boston and New York: Houghton, Mifflin & Co. 1901. pp. xvi, 201.

A COMPILATION OF THE BAR EXAMINATION QUESTIONS OF THE STATE OF NEW YORK, SINCE 1896, WITH ANSWERS, REFERENCES AND NOTES. Edited by Wilson B. Brice. Albany: Matthew Bender. 1901. pp. 229.

A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. By Henry Brannon, Judge of the Supreme Court of West Virginia. Cincinnati: W. H. Anderson & Co., 1901. pp. vi, 562.

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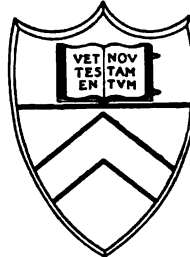
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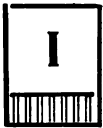
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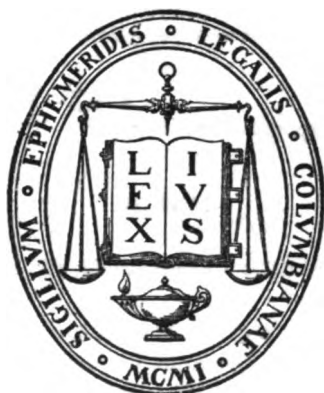
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NICHOLAS MURRAY BUTLER, LL.D.,  
*Acting President.*

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## THE REMEDY BY *CERTIORARI* IN THE STATE OF NEW YORK FOR ILLEGAL, ERRONEOUS OR UNEQUAL ASSESS- MENTS.<sup>1</sup>

THE subject of this paper relates only to assessments of real and personal property for local taxation, and does not embrace assessments of real property for local improvements.

The remedy furnished by the writ of *certiorari* was adopted in this State by the Supreme Court early in its history, and was modeled largely if not entirely from the writ as administered in England under the common law. The writ, both in England and in this State, at first only brought into question the jurisdiction of the lower court or tribunal, and did not present to the upper Court any question of law or fact upon the merits of the case. In New York State, during the early part of the Nineteenth Century, the common law writ was the only means of reviewing decisions of tax assessors, although by various acts of the Legislature the writ of *certiorari* was extended or applied to many proceedings of a criminal or quasi-criminal nature.

Until about the year 1840 the decisions appear to have been fairly consistent in applying the old rule that a *certiorari* could not review anything but the jurisdiction of the lower court or tribunal; but about this year doubt began

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<sup>1</sup> Ordered to be printed as a part of the proceedings of the Tax Conference held at Buffalo, May 24th and 25th, 1901.

to be entertained in the minds of the Judges whether questions of law upon the merits might not also be considered by the courts. Accordingly, as time went on, by small degrees a departure was made from the old English rule by some of the Judges, although others in turn refused to enlarge the functions of the writ. This conflict became so apparent about the year 1865, that Morgan, J., in the case of *Baldwin v. The City of Buffalo*,<sup>1</sup> said that the decisions of the courts in relation to the office of a common law *certiorari* were so conflicting that it was quite impossible to say that any settled rule had ever been established in this State from which the courts had not subsequently departed. The opinion in that case, however, laid it down as established by the decisions of the Court of Appeals, that a writ of *certiorari* would bring up so much of the evidence as was necessary to present the questions of law upon which the relator relied to avoid the determination of the inferior tribunal. Following this decision, there were a number of cases in the Court of Appeals which substantially settled the law to be, that the writ would take up questions of law as well as the jurisdiction of the lower tribunal, but that questions of fact could not be considered.

This continued to be the state of affairs throughout the State (exclusive of the City of New York) until Chap. 269 of the Laws of 1880 was passed, which provided for a *certiorari* to be issued by the Supreme Court upon the petition of a person assessed, which might allege that the assessment was illegal, or erroneous by reason of over-valuation, or was unequal by reason of the fact that the assessment had been made at a higher proportionate valuation than other real or personal property had been assessed on the same assessment roll by the same officers. Sec. 1 of this act provided specifically what must be shown in order to obtain the writ and under what conditions it could be granted. This act is preserved at the present day as Sec. 250 of the Tax Law of 1896 (Chap. 908 of the laws of that year). Under this act assessments outside of the City of New York, for both real and personal property, may be reviewed for (1) illegality, including jurisdictional questions, (2) for over-valuation, both as matter of law and as matter of fact,

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<sup>1</sup> 35 N. Y., 380.

and also (3) for inequality which may be alleged as a reason for reduction or cancellation of the assessment.

There is, however, one feature of the proceedings by *certiorari* under this Act of 1880, which, previous to the passage of that statute, was wholly unknown. The writ of *certiorari*, in its original function gave essentially merely a right of review. Previous to the Act of 1880 the only function of the writ was to give a right of appeal from the inferior tribunal. The Act of 1880, however, provides that if, upon the hearing, it shall appear to the Court that testimony is necessary for the proper disposition of the matter, the Court may take evidence, or may appoint a referee to take such evidence as the Court may direct, and such testimony shall constitute a part of the proceedings upon which the determination of the Court shall be made. The effect of this provision in the statute has been held in the case of *People ex rel. Manhattan Railway Company v. Barker*,<sup>1</sup> to bring about the result that in cases where the testimony is taken, the writ operates as a *venire de novo*, and, really, brings about a new trial of the same questions that were submitted to the inferior tribunal. Both at common law and under the Code, the return to the writ is conclusive. Not so in the case of the *certiorari* taken out under the Act of 1880. The petition is regarded in the nature of a complaint, and the writ and the return to the writ as an answer. An issue thus being joined, and testimony taken at Special Term, the issues are retried, and the Court proceeds to the determination anew of the precise questions that had previously been disposed of by the assessing officers. There is still some debatable ground with respect to the right of the relator to insist upon the introduction of testimony at Special Term and upon the hearing. The better view, however, seems to be that where there is an issue of fact joined by the petition and the return, and where the cause is not to be disposed of merely on questions of law, the relator has a positive right to insist upon putting in further testimony at the hearing, and to obtain a new trial of the issues of fact. It is obvious that such issues of fact would most generally arise in cases of overvaluation or inequality of valuation, or non-residence.

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<sup>1</sup> 152 N. Y., 417.

In regard to the City of New York the legislation has not been so simple. In the year 1857, by Chapter 677 of the acts of that year, Section 24, it was provided that in the City of New York a *certiorari* to review and correct *upon the merits* any decision or action of the Commissioners of Taxes would be allowed by the Supreme Court or by any Judge of that Court, directed to the Commissioners upon the petition of the party aggrieved, and should with the return be heard and decision rendered by the Court in preference to other matters. Subsequently, in the year 1859, a further revision of the tax laws as regards the City of New York was made, and Section 24 of the Act of 1857 was re-enacted as Section 20 of Chapter 302 of the Act of 1859. Under this act the evidence was considered by the Court and the question of over-valuation was deemed to be taken up by the writ.

In the year 1882 an act,<sup>1</sup> was passed to consolidate all existing legislation in regard to the City of New York, and the act of 1859 was re-enacted in such act as Section 821. In 1885 the Legislature, evidently fearing that the general tax act of 1880 might be deemed to apply to the City of New York, passed an amendment to Section 821 of the Consolidation Act, by which the writ of *certiorari* in New York City was confined to questions of illegality and over-valuation, and the Supreme Court was precluded from exercising by this writ the power to review assessments which were unequal, or made at an excessive rate of valuation as compared with that adopted for other property on the same assessment roll.

This legislation being deemed unjust to the City of New York in granting to the assessors great powers for oppression and favoritism, a strong effort was made upon the enactment of the Charter for Greater New York to change the rule, and accordingly when that Charter was passed<sup>2</sup> the Act of 1880 was closely adhered to, and by Section 906 real estate assessments were allowed to be questioned by writ of *certiorari* on the ground of inequality, although the right to attack assessments on personal property on this ground was withheld.

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<sup>1</sup> Chap. 410.

<sup>2</sup> Laws of 1897, Chap. 378.

The only statutory difference now existing between the right of a taxpayer to pursue a remedy by *certiorari* outside of the City of New York and within its limits consists in the rule that in New York City assessments upon personal property may not be questioned by reason of any alleged inequality between the particular assessment complained of and other assessments for personal property upon the same assessment roll, nor can assessments of personal property be contrasted with those of real estate.

The decisions affecting the writ of *certiorari* as applicable to cases of inequality of assessment have been hardly homogeneous and it is somewhat difficult to extract from the mass of authorities what is the true rule. In looking the cases over a great distinction is at once apparent between the remedy for inequality in New York City and that for inequality elsewhere. Outside of the greater city the proceeding is governed by the Act of 1880, and it has been held in one decision<sup>1</sup> that the petition for the writ need not state in detail wherein the inequality existed, but that it might allege that the assessment was unequal in the language of the statute and that the petition was in the nature of a pleading, and conclusions of facts were alone required to be stated and not the facts themselves.

Somewhat later, in the case of *People ex rel. New York Central and Hudson River Railroad Company v. Budlong*,<sup>2</sup> it was decided that when relief was sought on the ground that the valuation placed upon the relator's property was higher than that placed on the property of various other persons or corporations in the town, instances of such inequality should be stated, but in that case it was held that where a petition alleged that the relator's property was assessed at 95 per cent. of its value and all other property at 50 per cent. of its value, the petition was sufficient without going further into details and specifying any instances wherein such valuation was adhered to. Later cases outside of New York City<sup>3</sup> seem to have followed this rule and problems such as confront the assessors and taxpayers in the greater City of New York are avoided elsewhere.

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<sup>1</sup> *Matter of Nesbit*, 3 App. Div.

<sup>2</sup> 25 App. Div., 373.

<sup>3</sup> *People ex rel. Erie R. R. Co. v. Webster*, 49 App. Div., 506.

In New York City, complications arise in applying the remedy of *certiorari* to cases of inequality in that the Greater New York Charter, which first permitted this remedy, required instances of the inequality to be set forth in the petition. The question immediately arose whether every instance of such inequality should be stated or whether one or two were sufficient.

It was contended by counsel in the case of the People *ex rel.* People's Trust Company *v.* Feitner,<sup>1</sup> that the Charter was not supreme, but it was held that as the Charter was passed in 1897 and the General Tax Law in 1896, the Charter as the later expression of the legislative will should control in every case where the provisions of the two acts were in conflict. In that case also the Charter provision that inequality might only be raised in New York City with respect to real estate assessments was applied, and the relator who sought to review the assessment upon mortgage bonds on the ground that the assessment on such bonds was higher than upon real estate generally was held not entitled to the writ.

Approaching now more closely the difficulties which it was intimated existed in New York City in applying the remedy as regards inequality, we find that in the case of People *ex rel.* Bronx Gas Light Company *v.* Feitner,<sup>2</sup> the Appellate Division, First Department, decided that where inequality was sufficiently alleged in the petition for the writ and a sufficient number of instances of it were alleged, the Court at Special Term was obliged, upon application of the relator, either to order a reference to take the testimony with regard to the allegations of the petition or to hear it itself. It was decided that Section 253 of the Tax Law, which provides that testimony may be taken if it is necessary for the proper disposition of the matter, was really not permissive, but mandatory, and that the Court had no discretion, but upon due demand by the relator, showing a *prima facie* case, was compelled to order that testimony be had. In that case, however, the petition was regular and complied with the charter provisions in stating a number of instances of inequality. It does not appear

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<sup>1</sup> 51 App. Div., 176.

<sup>2</sup> 43 App. Div., 198.



from the opinion in the case, however, whether all these grounds and facts contained in the petition for the writ were or were not presented before the Commissioners.

In the later case of *People ex rel. Sutphen v. Feitner*<sup>1</sup> the relator owned property on Riverside Drive whose assessment had been largely increased in the year 1898, and he accordingly applied to the Commissioners for a reduction of the assessment, alleging that the assessment was larger than the assessed value of adjacent property in accordance with the market value of the same. The petition, however, stated no instance of inequality, but simply alleged that the assessment upon the relator's property had been raised from what it had been previously, and contained the general averment that it was greater than the property adjacent. The Commissioners re-assessed the property, and upon the further report of the deputy assessor ordered the assessment to stand. At the Special Term, when the relator moved for judgment upon the papers, the motion was denied. The relator then moved that further testimony be taken to support his allegations. This the Court denied on the ground that further testimony was not necessary. The Appellate Division said that although the rule of the Bronx case that Section 253 of the Tax Law must be considered as mandatory and not as permissive was applicable upon the facts of that case, yet that where no facts were presented before the Commissioners and the petition for the writ contained no allegations of instances of inequality and merely stated general conclusions, the courts should not be burdened with the entire duty of taking evidence upon the issue of inequality, and that it was never intended that the entire burden of reviewing assessments should be placed upon the courts and not upon the assessors. It was accordingly held that Section 253 of the Tax Law would not be construed as mandatory, except in cases where facts had been presented before the Commissioners and in the petition for the writ.

Considering this case and the Bronx case together, the true rule seems to be that in cases where the relator desires to have evidence taken by the court or by a referee to be appointed by the Court, the Court must make such

<sup>1</sup> 45 App. Div., 542.

an order where the relator has complied with the charter requirements and stated instances of inequality, but that where he has neglected to state such instances he will not be assisted by the courts in ordering a reference or taking testimony. A still later case<sup>1</sup> fully confirms this statement of the rule. This doctrine would seem to put upon a relator the burden of extreme care from the very start of the proceeding; but it has been held in a number of cases that at any time the relator may apply to the court to be allowed to amend his petition, and the courts have frequently in the decided cases stated that such amendments are within the discretion of the court and might be allowed at any time before final determination of the issues presented by the writ and return.

In a recent case decided by Judge Andrews,<sup>2</sup> these problems are presented, and it is suggested that it must shortly be decided, whether the Greater New York Charter can be construed to have totally changed the rule laid down by the Court of Appeals as to the remedy furnished a taxpayer by the Act of 1880.

Considering the writ of *certiorari*, as applied to questions of over-valuation of property by assessing officers, it is only necessary to show in the petition for the writ that the property has been assessed at a sum in excess of an amount at which, under ordinary circumstances, it would sell; and it is not necessary that these very words be used, but any language that is equivalent may be employed. In the case of *People ex rel. Broadway Improvement Company v. Barker*,<sup>3</sup> the relator stated that the property was assessed at \$210,000 more than its market value, and it was held that this was sufficient compliance with the provisions of the statute, as it was equivalent to stating that the property was assessed \$210,000 more than the sum it would bring at a sale.

Where the assessment is illegal, either from want of jurisdiction of the assessors or for other causes, the writ of *certiorari* is the proper remedy, although in cases where

<sup>1</sup> *People ex rel. The Broadway Realty Company v. Feitner*, decided by the Appellate Division, First Department, in April, 1901.

<sup>2</sup> *People ex rel. Marlborough Hotel Company v. Feitner*, 33 Misc., 293.

<sup>3</sup> 14 App. Div., 412.

there is absolute want of jurisdiction in the assessors, either because of non-residence or other cause, a mandamus can also be employed.

The decisions in the Appellate Division have threshed out these principles quite fully, and the Court of Appeals, in a recent case, has refused to interfere with the discretion of the Appellate Division in refusing a mandamus; so the law upon this subject can practically be deemed settled. One of the most important of these authorities is the case of *People ex rel. Powder Company v. Feitner*,<sup>1</sup> where the corporation had its office in Tarrytown, Westchester County, but was assessed in New York City for the year 1898. On July 18th a petition for a writ of *certiorari* was presented to the court, and it was alleged that the assessors had no jurisdiction and that the assessment was illegal. It was objected that *certiorari* was not the proper remedy, but the court held that under Section 250 of the Tax Law the writ could be employed to review assessments void for want of jurisdiction, as well as any other illegal assessments, and when assessors acted without jurisdiction their action was illegal within the meaning of this section of the Tax Law.

In *People ex rel. Cochran v. Feitner*,<sup>2</sup> the Court had a state of facts almost the converse of those considered in the Powder Company case, and it was there held that where an assessment for personalty was made against the executors, administrators and trustees of the estate of H. P. DeGraff, a mandamus could not be employed to strike the assessment off the roll; that the assessment was illegal in form, but that as long as the assessors had jurisdiction over the property, the writ of *certiorari* was the only remedy, and that mandamus would not lie. The Court in considering the question stated that either the Tax Law or the Code *certiorari* might be employed at the option of the relator, as the assessment was illegal and could have been remedied by the writ at the common law. A somewhat similar question arose in the case of the *People ex rel. N. Y. Cent. & Hudson River R. R. Co. v. Feitner*,<sup>3</sup> where the local

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<sup>1</sup>41 App. Div., 544.

<sup>2</sup>44 App. Div., 239.

<sup>3</sup>55 App. Div., 544.

tax commissioners assessed the relator for real estate, and included the tunnel property from 42d street to the City limits. This had already been assessed, under the provisions of the Special Franchise Tax Act, by the State Board, and under that act local tax commissioners were forbidden to tax property that had already been taxed by the State Board. Mandamus proceedings having been brought to cancel this assessment, the Court refused to remove the assessment from the rolls. It was held that the relator's proper remedy was *certiorari* and that mandamus would not lie. Upon a mandamus the Court had only the right to strike off the entire assessment or permit it to stand, and upon the writ of *certiorari* correctionary powers were granted to the Court as well as the power to strike out the assessment. The Court said that the tax commissioners had general jurisdiction over the property, and therefore the remedies were not concurrent, and that mandamus could not be used. This case was carried to the Court of Appeals,<sup>1</sup> where the appeal was dismissed, the Court refusing to review the discretion of the Appellate Division in dismissing the writ of mandamus. These cases support the conclusion that mandamus is a proper remedy only in a case of total want of jurisdiction on the part of assessors, and that even then it is a concurrent remedy only, and that *certiorari* can also be used. *Certiorari* is, as the courts declare, a proper remedy in all cases to review tax assessments.

Let us now consider somewhat in detail the cases which have regulated the procedure in applying for and obtaining the writ.

A number of cases have arisen in the last three or four years in this State as to who can apply for a writ of *certiorari*, and who is entitled to verify the petition, and it has been held that in a proper case the petition for the writ may be verified upon information and belief,<sup>2</sup> and that a tax agent of a large railroad was qualified to sign and verify the petition on behalf of the company.<sup>3</sup>

In making application for writs of *certiorari* it has been

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<sup>1</sup>166 N. Y., 154.

<sup>2</sup>People *ex rel.* West Shore R. R. Co. *v.* Johnson, 29 App. Div., 75.

<sup>3</sup>People *ex rel.* Erie R. R. Co. *v.* Webster, 49 App. Div., 556.

decided that the writ must be addressed to the entire Board of Assessors, and not to the individual members or to a majority of them by name.<sup>1</sup> A relator who addressed his writ in this fashion was held to have committed an error in practice, and he was directed by the Appellate Division to apply to the Special Term for leave to amend his writ.

Another interesting point as to parties to the petition arose in the case of the People *ex rel.* Washington Building Co. *v.* Feitner.<sup>2</sup> In that case twenty-two relators joined in the same petition for a writ, alleging that they had each been assessed too high for their respective pieces of real estate. The parcels of real estate owned by the separate relators were not contiguous, although in the same general neighborhood. It was held that Section 250 of the Tax Law did not contemplate uniting of taxpayers to question assessments unless they complained of the assessments for the same reason and upon the same or identical facts; and the Court considered the situations of the various pieces of property and concluded that obviously different reasons would apply to the assessment of each of the different parcels, and, therefore, superseded the writ. In the Court of Appeals this point was affirmed by a majority of the Court, holding substantially that only persons might join in a petition for a writ whose interests were largely identical, but a strong dissenting opinion was written, concurred in by Landon, O'Brien and Martin, Justices, who considered that the statute was intended to allow two or more persons to share the expense, where conditions were substantially alike, and that the remedy should be construed liberally by the courts, to avoid oppression and favoritism. However much we sympathize with the dissenting opinion in this case, the law stands that practical identity of interest is necessary for two or more property owners to join in the same petition for a writ.

With regard to the time within which the petition for the writ must be filed, more decisions have been rendered than on almost any other part of the practice connected with this remedy.

In approaching this question, we find a difference in the

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<sup>1</sup> People *ex rel.* Benedict *v.* Roe, 25 App. Div., 107.

<sup>2</sup> 30 Misc., 247; 163 N. Y., 384.

authorities between New York State in general and New York City. In New York State generally the Tax Law governs and the writ must be taken out within fifteen days after the filing of the assessment roll with the town clerk. Cases have arisen as to when the writ shall be deemed filed and in what cases a relator may be excused from a literal compliance with the statute. In *People ex rel. Cornell Steamboat Company v. Hornbeck*,<sup>1</sup> the relator appeared before the Tax Commissioners on the 3d Tuesday in August, and they reduced the assessment, completed the tax roll, verified and filed it upon that day, as required by Section 35 of the Tax Law. The statute states that a copy of the roll must be left with one of the assessors, where it may be seen and examined by any person until the 3d Tuesday in August, the date on which these assessors took action. The relator did not seek by petition to obtain the writ within fifteen days from the third Tuesday in August, but if the word "until" could be construed as excluding the third Tuesday and requiring the assessors to keep the writ until the next day—Wednesday—the writ would have been in time. It was held, however, that the word "until" meant that that day was to be excluded from the time the assessors were required to keep the books, and that their action in completing and filing the rolls on that day was perfectly regular; that they were not required to wait until the next day, and that the relator's writ, not being in time, should be dismissed. In *People ex rel. N. Y. Central & Hudson River R.R. Co. v. Sheppard*,<sup>2</sup> a motion was made to quash a writ of *certiorari* on the ground that it had not been taken up within the fifteen days. On August 22d—the last day to file the assessment roll—it was left with the mail at the town clerk's office. His wife, in his absence, took it in and as it was wrapped up in a paper, the package did not reach the town clerk's hands until the 24th, when he marked it filed as of that day. The relator's writ was taken out within fifteen days from the 24th, and it was held that it was in time, as the roll was not left originally with the clerk with the clear and unmistakable purpose of having it filed upon that day, so that the

<sup>1</sup> 30 Misc., 212.

<sup>2</sup> 33 Misc., 453.

real filing day must be considered to be the 24th. Although the courts have construed this time provision quite strictly, yet in *Matter of Stow*,<sup>1</sup> the relator was held excused for not applying for the writ within the fifteen days, by reason of the fact that no Special Term sat at that time, and the writ applied for and obtained at the earliest Special Term after the rolls were completed was held to have been properly granted.

In New York City these cases we have considered do not apply, as formerly under the Consolidation Act and now under the Charter, the assessments become final on the first day of May, and the petition for the writ may be presented within four months from the time they are final, as authorized by Section 2125 of the Code, or may be taken out within fifteen days from the time the assessment rolls, called "Books of the Annual Record," are filed with the Municipal Assembly on the first day of July. In *People ex rel. Bronx Gas Light Company v. Barker*,<sup>2</sup> a *certiorari* was obtained on June 29th, and it was construed to have been properly obtained, on the ground that the assessment became final on May 1st, and that after that time the Commissioners could only hear complaints which had been made before May 1st, and that a writ taken out within four months from May 1st was perfectly valid. This decision was followed by a number of other cases, and in *People ex rel. Brewing Company v. Feitner*,<sup>3</sup> the rule of the Bronx case was applied, and a petition for a writ presented on November 1st was considered too late, not being within the four months mentioned in Section 2125 of the Code.

Another requisite to obtain a writ is that, except in a case of want of jurisdiction, it should be stated that proof has been offered before the Tax Commissioners. The cases we have considered upon the question of inequality, the Bronx Gas Light Company case and the Sutphen case, largely decide the questions that have been raised as to this point. In *People ex rel. Speir v. The Tax Commissioners*<sup>4</sup> the writ was dismissed upon the ground that when the

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<sup>1</sup> 25 Misc., 580.

<sup>2</sup> 22 App. Div., 161.

<sup>3</sup> 41 App. Div., 496.

<sup>4</sup> 28 Misc., 591.

Consolidation Act took effect a person who desired to obtain a reduction of assessments by *certiorari* was required to do more than make a statement of claim before the Commissioners that all personal property was exempt. The examination upon oath of the applicant was made necessary by Section 820 of the Consolidation Act, and by Section 36 of the Tax Law, a statement must be filed with the assessors, under oath, specifying the respect in which the assessment complained of is incorrect. It seems that in that case the relator had filed a statement showing that his personal property (excluding all bank shares) which was subject to taxation, did not exceed six thousand dollars. The relator had included in his statement both property of his own and certain property as executor, belonging to an estate which had been willed to the City of New York for a free fountain. It was held that this general statement by the relator to the Commissioners about both his own property and the property represented by the legacy was not sufficient; that a specific claim for the exemption for the property devised to the city should have been made before the Tax Commissioners.

Not only must a statement be made before the Commissioners, but the relator must himself appear before them to be examined under oath respecting his statements, or appear by an attorney capable of presenting proof as to relator's claim for reduction or vacation of the assessment. In *People ex rel. Brown v. O'Rourke*,<sup>1</sup> the relator was assessed as an executor of an estate, and put in an affidavit that the estate, with one exception, consisted of shares of corporations that were already taxed. The assessors were dissatisfied with the affidavit and called upon relator to appear; but he had gone West, and his agent responded to their call, but the agent knew nothing of the facts. It was held that the affidavit could be disregarded by the assessors, and that their refusal to reduce the assessment was justified, on the ground of non-appearance of the relator. The Court, in holding this doctrine, assumed that the relator would have been entitled to a reduction of his assessments if the facts stated in his affidavit had been true and had been testified to by him in person.

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<sup>1</sup> 31 App. Div., 583.



A curious point that has presented itself in reviewing assessments complained of in the City of New York is: Where should the writ of *certiorari* be made returnable if the person or corporation resides outside of the Borough of Manhattan? This question was considered in the case of *The Matter of Tilyou*,<sup>1</sup> and in *People ex rel. Long Island R. R. Co. v. Feitner*,<sup>2</sup> and the rule reducible from those decisions is that in case of a corporation outside of Manhattan Borough the writ should be made returnable in New York County, as final determinations in cases of corporations are made by the Commissioners in New York County by the Charter; but that in cases of individuals the writ should be made returnable in the Borough in which the taxpayer resides. In cases of individuals the figures are kept in the Borough Tax Offices and the assessments made by the deputies in the different boroughs. All assessments in cases of persons and corporations in New York City are considered as made tentatively on the second Monday in January, and up to that time the main tax office has nothing to do with the assessments of individuals, although it has with the assessments of corporations. These cases clearly set forth the proper doctrine upon this point.

The question remains to be considered as to what is the effect of an assessment upon non-residents, how the question may be raised, and if the assessors persist in making such an assessment, are they entitled to collect the tax by using personal remedies? It has always been held that the tax assessors have no jurisdiction to impose a tax for personal property upon non-residents, and that their action (if they persist in placing such a tax upon the rolls) is an illegal act which can be remedied by a common law writ of *certiorari* or by a writ of mandamus, or the non-resident may consider the tax a nullity, and if it should be collected, sue to recover it back. All these propositions are so well settled that they have not been raised among the recent cases. In the case of *City of New York v. McLean*,<sup>3</sup> the defendant was a citizen of the State of New Jersey, who had never lived in New York, but he owned shares of stock

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<sup>1</sup> 57 App. Div., 101.

<sup>2</sup> 53 App. Div., 181.

<sup>3</sup> 57 App. Div., 601.

in the Standard National Bank, and was assessed in respect to those shares by the tax commissioners in New York City. For some reason the bank did not pay the assessment against those shares, and several years after the assessment was levied, action was brought by the City of New York against McLean to recover the amount of the tax. The sole question that arose was as to whether the defendant could be deemed personally liable on account of his being a non-resident. It was held, that in so far as residents were concerned, the Legislature had not only the power to tax their personal property without regard to domicile, but also had the power to subject such residents to a personal liability with respect to that tax as well as to any other tax. It was held that a foreign corporation, owning stocks in national banks in New York City, was required to appear before the assessors precisely as a resident, if he wished to raise the question that the assessors had erroneously overvalued stock, but the Court stated that it had never been decided in this State that a non-resident individual could be held personally liable for the tax. The Court considered with care a number of decisions of the United States Supreme Court bearing upon the question, and adduced the rule that although the State has the power to levy a tax upon personal property of a non-resident, situated within its boundaries and subject to its jurisdiction (and for that purpose could separate the situs of the owner from the actual situs of the property within the State and subject it to taxation because it was within the State), yet it could only enforce payment of the tax by virtue of its jurisdiction over the property and that it had not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax. From this decision Van Brunt and O'Brien, J. J., dissented on the ground that it was against public policy to permit such taxes to be evaded, as they would never be collectible from non-residents if the doctrine of the majority of the court was to prevail; because the certificates of the shares were in a sense negotiable instruments and could easily be transferred to other parties, so that the personal liability alone could be resorted to.

A curious question might arise in the event that a citizen

was assessed in his place of residence for a piece of real estate situated outside of the assessing district. It might be argued that the tax could not be enforced against the citizen by personal remedies in the event that he failed to get the assessment set aside by *certiorari*. Under the *dictum* in the case of the City of New York *v. McLean*,<sup>1</sup> there would seem to be no question of the right of the State to collect the tax from the individual taxpayer, as it is within the State's power to provide for the collection by personal remedy of all taxes assessed against its citizens. As the assessors of the district where the citizen resided would have no jurisdiction to assess him for the real estate, their acts would be void, and a sale of the real estate under proceedings taken to collect the tax would probably not give good title. However, this case could hardly arise in practice, as no doubt all assessors would know the boundaries of their assessing districts, and it would hardly be assumed that they would attempt in the face of the Tax Law to assess a resident of their district for lands which they knew to be outside of their jurisdiction.

We have thus followed the development of the writ of *certiorari* through the decisions, and have noticed the important points in the practice that has grown up within recent years upon this comparatively novel form of remedy—for we must remember that it is only since the year 1880 that the writ has assumed such wide functions and been used to correct the ordinary errors made by tax assessors. In many instances it would seem that the Tax Law, outside of New York City, was simpler and more logical, both in its theory and practice, than the modifications of the remedy that the Charter has brought forth; but it can be safely said on the whole that most of the disputed territory regarding this writ has either been covered or been entered into, and that there are now few pits into which the practitioner need fall, if he has consulted the body of decisions upon this remedy.

JULIEN T. DAVIES.

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<sup>1</sup>57 App. Div., 601.

## THE INSULAR CASES

IN the last term of the Supreme Court there were argued several cases involving the right of the United States to collect duties on merchandise passing between the mainland, and the islands occupied by them in the course of the late war, and afterwards ceded to them. At the close of the term the Court decided all but two of these Insular Cases as they are called.<sup>1</sup> The opinions cover more than two hundred pages. They discuss and suggest many far-reaching questions, some of them novel. Their prophetic, political and historical passages do not always elucidate legal principles, though the governing law of the cases is the broadest and least technical in all our jurisprudence. They disclose nicely balanced and vigorously defended differences of opinion, going to the very root of our theories of government and public conduct; and most of the judges deem the leading judgments irreconcilable.<sup>2</sup>

My comment on the Insular Cases will not cover every question considered. My criticism may savor of prepossession so far as it is based upon views I advocated before the cases were decided, some of them, indeed, before the Treaty of Paris was signed;<sup>3</sup> views rejected in part by some of the judges, but not condemned by a united Court. But I shall present the salient features of the cases with such comment as my convictions dictate.

<sup>1</sup> They are reported in Volume 182 of the Supreme Court Reports as follows: *De Lima v. Bidwell*, p. 1; *Armstrong v. U. S.*, p. 243; *Dooley v. U. S.*, p. 222; *Downes v. Bidwell*, p. 244; *Goetze v. U. S.*, p. 221; *Crossman v. U. S.*, p. 221 (an Hawaiian case); see also *Huus v. Steamship Co.*, p. 392. The cases undecided are: *Dooley v. U. S.* (No. 2), and *Pepke v. U. S.* (the Fourteen Diamond Rings case).

<sup>2</sup> See 182 U. S., pp. 201, 220, 239, 286.

<sup>3</sup> A Note on the Question of the Philippines, October 15, 1898; Constitutional Aspects of Annexation, *Harvard Law Review*, January, 1899; *Congressional Record*, January 11, 1899; Notes on the Law of Territorial Expansion, *Congressional Record*, May 31, 1900; The Law and Policy of Annexation, Longmans, Green & Co., 1901. I have referred to this book (cited as "Annexation") for a fuller discussion of some of the questions noted in this article.

Interesting comments on the Insular Cases are made by Hon. George F. Edmunds and Hon. George S. Boutwell, in the *North American Review* for August; by Judge Baldwin in the *Yale Review* for August; by Hon. Charles E. Littlefield in an address before the American Bar Association, and by Professor Burgess, of Columbia University, in the *Political Science Quarterly* for September.

## I.

The leading judgments in the Insular Cases are:

I. Prior to the exchange of ratifications of the treaty of Paris the United States military authorities in occupation of Porto Rico lawfully imposed duties on goods imported from the United States.<sup>1</sup>

To this all the judges assented, for the reason that Porto Rico was then merely foreign territory in our military possession.

II. After the exchange of ratifications, and prior to the passage of the Foraker Act (April 12, 1900), the United States authorities erred in enforcing the Tariff Act against goods brought to our mainland from Porto Rico,<sup>2</sup> and in imposing duties on goods brought to Porto Rico from our mainland.<sup>3</sup>

These judgments were approved by a bare majority of the judges, whose united opinions were voiced in each case by Justice Brown.

III. The Government is not obliged to refund duties collected under the Foraker Act on goods brought from Porto Rico to our mainland.<sup>4</sup>

Again the judges divide five to four, but Justice Brown is now ranged for the judgment with the four judges who dissented from the opinions of the Court delivered by him in the *De Lima* and *Dooley* cases, and these judges now condemn the reasons employed to support this judgment, which they support for antagonistic reasons. Here is remarkable discord and it is important to consider its effect. The object of a suit at law is a final judgment which binds the parties without regard to the reasons on which it may be founded. The permanent interest in a suit depends usually upon an opinion of the Court disclosing the reasons for its judgment. When the judgment is supported by clear and harmonious reasoning it is a vehicle for a principle of law. Discordant reasoning leaves

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<sup>1</sup> *Dooley v. U. S.*, 182 U. S., 222.

<sup>2</sup> *De Lima v. Bidwell*, 182 U. S., 1.

<sup>3</sup> *Dooley v. U. S.*, 182 U. S., 222.

<sup>4</sup> *Downes v. Bidwell*, 182 U. S., 244.

it a naked order addressed to the parties, without the opinion of the Court which is needful to promulgate an authoritative principle.

The distinction between the transitory interest of a judgment and the authority of an opinion is suggested in a series of cases in the Supreme Court. In *Ogden v. Saunders*,<sup>1</sup> the first question was whether a State legislature is forbidden by the Federal Constitution to pass a bankruptcy act. Four judges, including Justice Johnson, answered in the negative; three, including Chief Justice Marshall and Justice Story, dissented. Thus the question was resolved in favor of the States. The second question was whether a certificate of discharge in bankruptcy was effective against a citizen of another State. Again the judges divided four to three: Justice Johnson, supported by the three judges who had dissented on the first question, held that the certificate was not effective, and commenced the opinion by saying, "I am instructed by the majority of the Court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of State insolvent laws with reference to the violation of the obligation of contracts. I now stand united with the minority in the former question, and therefore feel it due to myself and the community to maintain my consistency."<sup>2</sup> A few years later William Wirt asked the Court whether Justice Johnson's second opinion in *Ogden v. Saunders* stood as the opinion of the Court,<sup>3</sup> evidently desiring to argue the question there discussed as still an open one, on the theory that the concurrence of the judges who had dissented on the main question was merely in the judgment, and not in the reasons. Chief Justice Marshall replied for the Court: "The judges who were in the minority of the Court upon the general question as to the constitutionality of State insolvent laws concurred in the opinion of Mr. Justice Johnson in the case of *Ogden v. Saunders*. That opinion is therefore to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion are to

<sup>1</sup> 12 Wheaton, 213.

<sup>2</sup> 12 Wheaton, 358.

<sup>3</sup> *Boyle v. Zacharie*, 6 Peters, 348.

"be considered as no longer open for controversy, but the settled law of the Court." Justice Story, delivering the opinion of the Court in *Boyle v. Zacharie*,<sup>1</sup> said, "The ultimate opinion delivered by Mr. Justice Johnson in the case of *Ogden v. Saunders*, 12 Wheaton, 213, 258, was concurred in and adopted by the three judges who were in the minority upon the general question of the constitutionality of State insolvent cases, so largely discussed in that case. It is proper to make this remark in order to remove an erroneous impression of the bar that it was his single opinion, and not of the three other judges who concurred in the judgment. So far as decisions upon the subject of State insolvent laws have been made by this Court they are to be deemed final and conclusive." Justice Clifford prefaces a comment on these cases by saying, "Misapprehension existed, it seems, for a time whether the second opinion delivered by Mr. Justice Johnson in that case [*Ogden v. Saunders*] was, in point of fact, the opinion of a majority of the Court, but it is difficult to see any ground for such doubt. Referring to the opinion, it will be seen that he states explicitly that he is instructed to dispose of the cause, and he goes on to explain that the majority on this occasion is not the same as that which determined the general question previously considered."<sup>2</sup>

I have reviewed these cases at some length in order to show how clearly the Supreme Court contemplates the possibility that a judgment may not carry an authoritative opinion. How completely this possibility is realized in the *Downes* case appears in the following excerpts from the official report: "Mr. Justice Brown \* \* \* announced the conclusion and judgment of the Court." "Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance." Then Justice White commences his opinion by saying: "Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so

<sup>1</sup> 6 Peters, 635, 643.

<sup>2</sup> *Baldwin v. Hale*, 1 Wallace, 223, 230.

"are different from, if not in conflict with those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me." And Justice Gray says: "Concurring in the judgment of affirmance in this case, and in substance agreeing with the opinion of Mr. Justice White, I will sum up the reasons for my concurrence in a few propositions, which may also indicate my position in other cases now standing for judgment."

The several opinions plainly expose the reasons for these cautionary statements. Justice Brown bases the judgment on the proposition that the Constitution cannot be effective in territory within our sovereignty, but beyond the States, without some action by Congress; but this is emphatically denied by Justice White and his associates, and also by the four judges who dissent from the judgment. Justice White and his associates base the judgment on the proposition that the territory acquired from Spain will not become domestic until it shall be definitely "incorporated" through the consent of Congress; but this is denied by Justice Brown, and also by the four judges who dissent from the judgment. Could Justice Brown be convinced that the Constitution is effective beyond the States, he would not hesitate, it seems, to apply its provisions to Porto Rico as a part of our domestic territory. Could Justice White and his associates be convinced that Porto Rico is domestic territory, they would not hesitate, it seems, to apply the Constitution to the full extent. To complete the disparagement of *Downes v. Bidwell*, a scrutiny of all the opinions in the Insular Cases shows that each of the two propositions separately advanced to sustain the judgment is actually condemned by a majority of the judges.

Justice McKenna thus admonishes his brethren of the majority in the *De Lima* case: "If other departments of the Government must look to the judicial for light, that light should burn steadily. It should not, like the exhalations of a marsh, shine to mislead."<sup>1</sup> This reproach cannot be turned against the opinions approving the judgment in the *Downes* case. These do not "shine to mislead"; they emit no guiding light. When we have read them, we know that

<sup>1</sup> 182 U. S., 205.



this particular taxpayer has lost his suit; we do not receive a principle of the law of taxation.

The judgment in *Downes v. Bidwell* binds the plaintiff. It may be accepted by Congress as a left-handed endorsement of a temporary fiscal policy. More cannot be said in its favor. Because it establishes no principle of law, it does not encourage Congress to duplicate for the Philippines the customs *régime* instituted temporarily for Porto Rico. For this reason it has not the usual effect of a judgment for the Government in a "test case"—it does not forbid other persons to press similar claims. Whether Porto Rico is a part of the United States within the meaning of the constitutional provision in regard to uniformity of customs duties is still a debatable question; and if it shall be presented to the Court again there will be no opinion of the Court to be followed, or reversed, or explained. There will be several opinions of the judges to be examined. The opinion of the Chief Justice, and of Justices Harlan, Brewer and Peckham, will certainly be entitled to equal consideration with the others. It deserves the approbation of the Court.

## II.

Having considered these particular judgments of the Court in the Insular Cases, let us examine the several opinions for information concerning the power of the United States to enlarge their dominions, the relation of acquired territory to the republic and the relation of the Constitution to acquired territory.

All the judges affirm the power of the United States to acquire territory: All agree that Porto Rico was duly acquired: Then unity disappears.

The judgment in the *De Lima* case was approved by a bare majority of the judges, but it carries the opinion of the Court because each judge concurred in the essential and sufficient proposition that territory in the condition of Porto Rico is not 'foreign' within the meaning of our Tariff Act. By parity of reasoning it appears that it is

not "foreign" within the meaning of other important statutes, notably the immigration laws.

A narrow view of the *De Lima* case might disclose merely a declaration of a rule of statutory construction, but viewing it broadly, and reading with it the opinion of the same judges in the *Dooley* case we understand that the Court announces a very important rule of public law. The Court says in the *Dooley* case, that upon "the conclusion of the Treaty of Peace and the cession of the island to the United States \* \* \* Porto Rico ceased to be a foreign country and the right to collect duties on imports from that island ceased. We think the correlative right to exact duties on imports from New York to Porto Rico also ceased."<sup>1</sup> Here is no rule of statutory construction, but a statement of the principle, already suggested in the *De Lima* case, that land occupied in virtue of a treaty of cession is no longer foreign; and if not foreign, then domestic for as the Court says in the *De Lima* case: "No act [of Congress] is necessary to make it domestic territory, if once it has been ceded to the United States."<sup>2</sup>

The Administration, though signally defeated in its contention that after the ratification of the Treaty of Paris Porto Rico remained foreign territory for purposes of taxation, still persists in taxing commerce between the Philippines and our mainland. The excuse for this course is that the Supreme Court has not yet decided the *Pepke* case, one of the first of the Insular Cases to be argued, and involving the right to collect duties on merchandise brought here from Manila. The motive for this course is not, I am sure, the "protection" of our industries against Philippine competition. Nor is it merely the continued enjoyment of a particular kind of insular revenue. Recalling that the Administration has assumed to be the sufficient government of the Philippines, and has appointed agents at pleasure with powers of its own devising, it would seem that the Administration continues its tariff policy in order to justify to itself the hope that the Court will sustain this policy in

<sup>1</sup> 182 U. S., 234.

<sup>2</sup> 182 U. S., 198.

the Pepke case upon grounds sufficiently broad to confirm its fundamental position that the Philippines are a province where the executive department rightfully makes, expounds and executes the laws unchecked, save by the limitations imposed by Congress<sup>1</sup> on grants of franchises, and on sales and leases of public lands and mining and timber rights.

Upon what principle of law can the Philippines be thus radically distinguished from Porto Rico? Our rights to possess each country were secured by one treaty and in substantially similar terms; but let it be admitted that, in point of public law, these may be in themselves naked rights, to be perfected by some act of possession before the new status of the territory shall be fixed. If, then, the Philippines shall be adjudged foreign, while Porto Rico is domestic territory their differentiation must be based upon the assumption that the United States have not there perfected their treaty right. And, if they have not, their failure is not attributable to lack of will, nor to any opposition from Spain; it must be attributed to the armed resistance of islanders. This position seems to be maintained by the Administration in a communication from Secretary Root to Governor Taft in the Philippines where we read: "the most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the Court, is in the fact that Porto Rico was at the time of the cession in full peaceable possession, while a state of war has continued in the Philippines. As the question of the President's power to impose duties in the Philippine Islands under existing conditions of military occupation has not been decided by the Court, the President has determined to continue to impose duties as heretofore."<sup>2</sup>

The asserted distinction between Porto Rico and the Philippines has been pressed since, and because of the decision in the De Lima case. The Pepke case, which it is hoped will establish the distinction, was argued for the Government in connection with one of the Porto Rico cases, and

<sup>1</sup> 31 U. S. Statutes at Large, p. 910.

<sup>2</sup> Cited in a letter of Henry L. Nelson, Esq., in N. Y. *Evening Post*, August 20, 1901.

the argument proceeded on the theory that each country was equally, and for substantially the same reasons "foreign" to the United States.

In one respect the Administration would doubtless be gratified by an adjudication that the Philippines are not in our possession in the legal sense. All critics who condemn its policy in the archipelago on constitutional grounds would be disarmed. Even the returning of escaped slaves to their masters, which we are told has been done when ownership was clearly proved,<sup>1</sup> might not offend against the Thirteenth Amendment; for are the islands even within the "jurisdiction" of the United States, if not in their possession? And if not within their jurisdiction in this, then not in any constitutional sense, and the President in the Philippines is simply the commander-in-chief of our forces abroad.

While a decision that the Philippines are not in our possession might legitimate a temporary policy, it would remove the only theory which gives any moral support to our subjugation of the islands—that since the ratification of the treaty we have been maintaining our sovereign rights against the attacks of insurgents. Are Filipinos "insurgents" if the islands have never been in our possession? Can the definition of rebellion be stretched to cover resistance to a sovereign who has never, by gaining possession, established that visible government in a country which rightfully demands the obedience of its inhabitants? Yet, if the Filipinos in arms were not in insurrection they must have been an independent people, and the charge must be true that in point of law Spain went through the form of ceding rights in the Philippines already irretrievably lost, and that we gained simply her permission to wrangle for possession with the inhabitants. Whilst I have always been opposed to the acquisition of the Philippines, I have ever believed that the United States, being present effectively in the Philippines at the ratification of the Treaty of Paris, did acquire immediately legal possession of the entire archipelago. To maintain this possession in a broad sense it is

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<sup>1</sup> See extract from the appendix to Gen. McArthur's late report, printed in N. Y. *Evening Post*, August 16, 1901.

not necessary to insist that it exists for all purposes in localities actually dominated by insurgents. For example, in the Castine<sup>1</sup> case, a port in Maine seized by the British in the war of 1812 was decided to be, during the hostile occupation, no part of the "United States" within the meaning of our revenue laws, and, possibly, the principle of this rule would be applicable in the Philippines. Be this as it may, the principle merely accords an unavoidable recognition of the *status quo* in regard to current affairs; it does not affect the fundamental possession of the absent sovereign. For example, a child born in Castine during the British occupation was, unquestionably, born in the United States.

If the Court shall give due weight to the facts in the Pepke case it will find that, when the diamonds were brought from Manila in the spring of 1900 the city was as completely in our possession as was San Juan in Porto Rico at the date of the transaction in the De Lima case: Then it will follow the rule of that case.

But should the Court assert that conflicts in parts of the archipelago with armed bands of a self-styled government, created a "state of war," it would miscal a struggle which, however serious, was never war with all its incidents, in a legal sense;<sup>2</sup> and, going on to attribute this condition to quiet districts, it would extend arbitrary military power beyond the range of necessity, and therefore beyond its sphere. Even then how could the Court make this fictitious "state of war" in Manila, an excuse for forfeiting goods in Chicago for non-payment of duties under the Dingley Act?

Yet the Court must go further in order to support the policy of the Administration to-day. The situation in the Philippines is different from that of eighteen months ago. Civil government is established and its courts are trying causes. American school teachers are at work. Aguinaldo is in prison, and his government dispersed. Whilst discontent is rife, armed resistance has decreased.

To sustain the Administration to-day the Court must, in some way to be yet explained, declare the archipelago

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<sup>1</sup> U. S. v. Rice, 4 Wheaton, 346.

<sup>2</sup> See Annexation, p. 108.

foreign territory because still in a "state of war" which obstructs our legal possession; a war which the Court must assume is continuously waged, until another department of government solemnly proclaims that it is all over. Now the judiciary should recognize executive proclamations as marking, for some purposes, the beginning and the end of war,<sup>1</sup> and sustain executive power when duly exerted for the repression of disorder, but never will respect for a coordinate department justify its approval of an assumption of the most searching and despotic of all powers in any place in the jurisdiction of Congress where, plainly, there is no war.

The constitutional powers of the Federal Government for the suppression of insurrection, and the governing of conquered domestic territory were amply vindicated in the Civil War. These powers are ready to its hand in the Philippines. It assumes others for no military necessity, but for the purpose of holding the islands apart from our domestic territory, and ruling and taxing them at discretion.

Coming to the relation of the Constitution to acquired territory we find that all the judges except Justice Brown are of the opinion that the Constitution extends to it of its own force, or, to state this rule in another phrase, the Federal Government will not be relieved from constitutional obligations because it is acting outside the territory of the States.<sup>2</sup> The Constitution "follows the flag" wherever the

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<sup>1</sup> See Annexation, p. 107.

<sup>2</sup> That this fundamental rule is as firmly sustained by the dissenting, as by the concurring judges in the Downes case appears in the following general propositions announced by Justice White:

"*First*.—The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Even then, when an act of any department is challenged, because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, whilst confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere.

"*Second*.—Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.

"*Third*.—Hence it is that wherever a power is given by the Constitu-

flag stands for sovereign proprietorship. And we accept cheerfully the oracular caution that only applicable clauses follow, knowing that inapplicable clauses cannot apply, and being assured that the question of applicability is judicial, not political; for the manner of most of the judges in dealing with the Insular Cases rebukes the contention that the

tion and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.

"*Fourth.*—Consequently it is impossible to conceive that where conditions are brought about to which any particular provision of the Constitution applies its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

"*Fifth.*—The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion. \* \* \*

"*Sixth.*—As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein. \* \* \*

"*Seventh.*—In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

"*Eighth.*—As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "To lay and collect Taxes, Duties, Imposts and Excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty besides would be repugnant to the requirement of uniformity throughout the United States. \* \* \*

"From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico."—Justice White in *Downes v. Bidwell*, 182 U. S., 288.

actions of the President and Congress in our new possessions lie within that sphere of practical politics wherein Courts must not intrude. While some of these judges are driven into errors of law by apprehensions of political embarrassments, none abdicates the judicial prerogative of squaring public powers with private rights by constitutional standards.

Satisfied that the Constitution is not essentially foreign to Porto Rico and the Philippines, let us consider the applicability of some of its more important provisions.

The provision which confides legislative power to Congress exclusively is a structural law of our Government. This law must apply wherever Congress has jurisdiction, and be it noted that its jurisdiction, that is to say its right to legislate, was extended over Porto Rico and the Philippines the moment they became domestic territory by the ratification of the Treaty of Paris.<sup>1</sup>

Waiving the question as to how far Congress may condone usurpations of legislative power by the executive department by ratifying its acts,<sup>2</sup> we may anticipate a declaration from the Supreme Court in a proper case that in the new, as in the old possessions of the United States the fountain of all authority is law, and that, excepting the applicable clauses of the Constitution, this law must emanate from Congress directly or through competent agents, or else it must be the old law of the place tacitly approved by Congress.

Justice Brown seems unprepared to decide whether those prohibitions and guarantees of the Constitution, which make up what may be called a Bill of Rights, are enforceable in our new possessions. He is unable to overcome an inherited belief in the value of these rights generally, yet hesitates to concede to Porto Ricans and Filipinos an indefeasible right to enjoy them. He is quite sure, at any rate, that these people may rely upon "certain principles of natural justice inherent in the Anglo-Saxon character, and finally disclaims "any intention to hold that the inhabitants " of these territories are subject to an unrestricted power

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<sup>1</sup> See Annexation, p. 121.

<sup>2</sup> See Annexation, p. 116.



"on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."<sup>1</sup>

Fortunately we need not seek historical confirmation of the comfortable assumption that the Anglo-Saxon is incapable of abusing power; nor are we pressed to decide whether statutes can be set aside for repugnancy to "natural justice." Other judges speak with greater assurance. They refuse to deny the Bill of Rights to the islanders, though there seems to be doubt in the minds of some of them whether all its clauses will be found equally applicable. Without discussing this question here we may at least reject what I understand to be the suggestion that an express denial of power may create an obligation of more weight than a simple declaration of principle. It would be improper to hold, for example, that, while the free exercise of religion is assured because the Constitution says: "Congress shall pass no law" prohibiting it, a loose definition of treason is permissible because the Constitution merely says: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." And one who would condone this method of interpretation in Manila must accept it in New York, for were there such a difference between denial of power and affirmation of principle it would be innate, and therefore equally effective in all parts of the republic.

The nearly unanimous opinion of the Court affirming the general obligation of the Bill of Rights in our new possessions without regard to differing views as to their precise status is a notable feature of *The Insular Cases*. It falsifies the impression, gained at home and abroad by misreading Justice Brown's opinion in *Downes v. Bidwell* as the opinion of the Court, perhaps by misjudging his own opinion, that the United States may rightfully govern acquired territory free from any constitutional limitation.

Had the *DeLima* and *Dooley* Cases been the only ones before the Court I think the authoritative definition of Porto Rico as domestic territory would be generally

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<sup>1</sup> 182 U. S., 283.

accepted as the premise to a conclusion that the island is a part of the "United States" within the purview of important clauses of the Constitution; but the judgment in *Downes v. Bidwell* halts the march of logic. The precise question in this case was whether Porto Rico is a part of that "United States" in which customs taxes must be uniform. Five judges, including Justice Brown, decide the question in the negative, and though, as we have seen, the dissonance of their reasons leaves their decision without an authoritative opinion, the reasons themselves require examination.

Justice Brown has been charged with inconsistency in defining Porto Rico as domestic territory in the *DeLima* and *Dooley* cases, and in this case as territory outside the "United States" of the Constitution. Now these definitions are essentially inconsistent, but they are quite reconcilable when reached by the processes of their sponsor. Approaching the subject from the side of public law he finds, very properly, that Porto Rico has become part of our domestic territory. Approaching the subject from the side of our peculiar constitutional law he is enmeshed in the theory that the Constitution was ordained for States of the Union alone, and so he must exclude this island from the "United States" of the Constitution. But this theory is condemned by all the other judges, who establish the converse theory so firmly that Justice Brown may be expected to follow Chief Justice Marshall's example, when overruled in the bankruptcy case,<sup>1</sup> and accept it as "the settled law of the Court." Then, if he adheres to his definition of "domestic" territory adopted by the Court in the *DeLima* and *Dooley* cases, will he not accept the conclusion, reached by all the other judges in the *Downes* case, that when territory becomes domestic it is a part of the "United States" within the purview of the uniform tax clause of the Constitution?

Justice White, speaking for Justice Shiras and Justice McKenna, says: "The sole and only issue \* \* \* is, "whether the particular tax in question was levied in such "form as to cause it to be repugnant to the Constitution.

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<sup>1</sup> See *supra*, p. 438.

" This is to be resolved by answering the inquiry, had Porto Rico, at the time of the passage of the act in question, been incorporated into, and become an integral part of the " United States? " <sup>1</sup>

This question turns wholly upon the word "incorporated." In Justice White's opinion there may be three stages in the transformation of foreign territory into a State of our Union—acquisition, incorporation and admission to statehood. By acquisition the United States assume sovereign proprietorship. By admission the land becomes the seat of a self-governing commonwealth. These processes are familiar; but what is "incorporation" here wedged between them? One who fails to recognize this middle stage as established in our polity will not be charged with inexcusable ignorance. Indeed Justice White himself finds the strongest suggestion for his position in a few phrases unearthed from the executive correspondence in regard to a single transaction in our history—the purchase of Louisiana. In this transaction Jefferson seems to approve this theory of "incorporation," but the occasional opinions of statesmen are at best of uncertain value in jurisprudence, and it is well known that Jefferson was greatly perplexed in regard to the legal effect of the acquisition he was determined to make. And if the draftsmen of the Louisiana Treaty had Jefferson's views in mind when they used the word "incorporated," in the Third Article, they have failed to establish them, for Chief Justice Marshall, speaking for the Supreme Court, in *New Orleans and De Armas*,<sup>2</sup> treats the promise to "incorporate" as a promise to admit to statehood—a meaning which, I venture to say, would have passed unquestioned a few years ago. In view of Marshall's opinion Justice White is not warranted in saying "The minutest analysis, however, of the treaty [the Louisiana Treaty] fails to disclose any reference to a promise of statehood, and hence it can only be that the pledge made referred to "incorporation in the United States."<sup>3</sup> Justice White's theory of "incorporation" cannot claim recognition on the score of usage. It is new to our jurisprudence, and, like

<sup>1</sup> 182 U. S., 299.

<sup>2</sup> 9 Peters, 224, 232.

<sup>3</sup> 182 U. S., 325.

any other novel suggestion, it should not be accepted without positive proof of worth.

How is "incorporation" supposed to be effected? Acquired territory will not glide into incorporated territory. Neither lapse of time nor strengthening ties of intercourse will accomplish the organic change. This change must be so definite that a court will be able to decide that a person is a citizen of the United States because of his birth in territory which on such a day became part of the United States; or that a New York merchant need no longer pay duties on imports from a certain locality, because on such a day it had become part of the United States.

Evidently "incorporation" must be effected by some law, and Justice White insists that the treaty-making body is incompetent to effect this result without the co-operation of Congress.<sup>1</sup> In support of his position he intimates that the treaty-making body cannot create citizens of the United States. But this, by the way, does not seem to be good law: Chief Justice Marshall, speaking for the Court, said of the Florida Treaty: "This treaty \* \* \* admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States." He is of the opinion, at any rate, that the Treaty of Paris was not intended to make Porto Ricans citizens, inasmuch as it reserved their "political status" for the determination of Congress. Yet the treaty also reserved their "civil rights," and Justice White does not hesitate to invest the islanders with important constitutional rights. I am sure he will find the treaty-making body quite as impotent to deprive these human beings of "political status" as to withhold from them all "rights."

These comments on the treaty-making power betray confusion of thought in attempting to determine the status of acquired territory from the status of its inhabitants. United States citizenship is, by the Constitution, acquired in two ways; by naturalization, and by birth within the United States. Citizenship by birth is the inevitable and involuntary consequence of being born within territory which, by

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<sup>1</sup> 182 U. S., 312.

<sup>1</sup> American Ins. Co. v. Canter, 1 Peters, 511, 542.

some antecedent and unrelated act, has been made a part of the United States. Applying this principle to the case of persons born in Porto Rico and the Philippines after the ratification of the Treaty of Paris, we find that we must first determine the status of the territory in order to fix the status of the persons.

Citizenship by naturalization is conferred upon aliens by the voluntary act of the Federal Government either through the application of an individual who craves the benefit of the Naturalization Act, or through what is called "collective naturalization," whereby the Government invests a body of people with citizenship without necessarily respecting their preferences. This collective naturalization is evidently in the minds of the judges who, by denying its operation in the case of Porto Rico conclude that the island is not part of the United States. This reasoning is imperfect. While we may determine the status of persons by our relation to the land they live in, we do not determine our relation to the land by our treatment of persons. To illustrate: I believe that upon the ratification of the Treaty of Paris the Porto Ricans became citizens, but not necessarily because of my opinion that the same act brought the island within the United States for, without affecting our relation to the territory, we might have left all the people, as we left part, to choose between Spain and the United States; in point of law, we might even have arranged that Spain should retain the allegiance of all her subjects. But, the republic having assumed proprietorship over the islands, I attribute citizenship to the islanders who, divested of Spanish allegiance, owe full allegiance to their new sovereign.<sup>1</sup>

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<sup>1</sup> See Annexation, page 61. Professor Westlake, in a letter criticising the use of "peaceable Boers as a defense against train wreckers" by forcing them to ride on the trains, gives his opinion of the status of the Boers after the annexation of their country by Great Britain: "The annexation has converted the Transvaal and Orange burghers into subjects of the King, and although, very properly, we do not press the change of *status* harshly on those who are still fighting against it, the relations between the King and those who accept his Government by living peaceably under it are not governed by the laws of war but by the law of the land. We claim their allegiance, as we prove by arresting Dr. Krause on a charge of treason, and their rights must accompany their allegiance. Therefore, to put a peaceable ex-Boer on a railway train as a defense would be the same thing, both legally and morally, as to do it to the natural-born British subject of oldest standing in Johannesburg. If it be suggested that the victims might be

I conclude that the theory of "incorporation" of territory is not promoted by discussing the law of citizenship.

Returning to the main line of the argument for incorporation we look for the sign by which Congress is supposed to express its intention to "incorporate" acquired territory into the United States. In the case of lower Louisiana this sign is discovered in the Act of March 2, 1805, providing that the inhabitants of Orleans Territory "shall be" entitled to all the rights, privileges and immunities secured "by said ordinance [Ordinance of 1787 for the government of the Northwest Territory], and now enjoyed by the people of the Mississippi Territory." The sign for upper Louisiana is the Act of June 4, 1812, creating the Territory of Missouri, by which, says Justice White, "the inhabitants of the territory were accorded substantially all the rights of the inhabitants of the Northwest Territory." The sign for Florida is the Act of 1822 containing substantially the provision of the Missouri Act. All these signs are based on the erroneous theory that the status of the people in our territory determines its relation to the United States. If "incorporating" all Porto Ricans and Filipinos would bring our new possessions into the United States, what would be the effect of "incorporating" only the islanders who speak English?

In the case of California the earlier signs of "incorporation" are absent, so a new one must be sought for, and it is found, not in any particular law of Congress, but in an implied assent of Congress to an "incorporation" provided for in the Treaty: And a like sign is supposed to mark the "incorporation" of Alaska. Justice White's observations on

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taken from the concentration camps, the dilemma arises—are the persons in those camps free to leave them or not? If they are, their remaining there brings them within the category of persons who have accepted a change of *status* by living peaceably under the King's Government. If they are not, we have no right to assume against them that their option, if they had any, would be exercised in such a manner as to make them still enemies.

"In these circumstances it is unnecessary to enter into the question whether the laws of war allow an invader to use the peaceable inhabitants of an occupied district as defenses on railways against train-wreckers."—*London Times*, September 23, 1901.

these annexations<sup>1</sup> are most unsatisfactory, for he fails to indicate the efficient act of Congress which from his standpoint is required to bring territory within the United States and make its people citizens.<sup>2</sup>

Justice Gray agrees "in substance" with Justice White, but in a personal opinion he applies the theory of "incorporation" only to territory acquired after war, thus avoiding, perhaps, responsibility for the views of his associates regarding the Louisiana purchase; and his sign of "incorporation" seems to be the establishment of a civil government by Congress at the end of a "transition period," during which military authority is perforce supreme. Now in point of

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<sup>1</sup> "After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States, and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious.

"Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced."—Justice White, *Downes v. Bidwell*, 182 U. S., 335.

<sup>2</sup> "If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the Government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic."—Justice Brown, *De Lima v. Bidwell*, 182 U. S., 198.

fact the transfer of territory from one state to another is usually followed by a "transition period"—a period of more or less inconvenience and perplexity during which the new sovereign is engaged in the task of establishing relations with its new people. And it is conceded that the law will not hold the new sovereign to too strict an account while it is endeavoring to bring order out of inevitably confused conditions.<sup>1</sup> But there is no reason why temporary difficulties in local administration should affect fundamental and unrelated matters; why, for example, a child born in Porto Rico should, because of these difficulties, be denied citizenship, and a New York merchant be obliged to pay duties on imports from the island.

So long, however, as Justice Gray defines a transition period as the time between the acquisition of territory and the establishment of civil government therein by Congress, his position is consistent, whatever we may think of its merit. But when we should expect him to declare that the "transition period" in Porto Rico was ended by the Foraker Act establishing civil government he prolongs the period indefinitely, saying, "If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to all the restrictions of the Constitution;" and he places the government of Porto Rico in the latter class. Now the fact that the government of Porto Rico is "temporarily" provided is not important in a constitutional sense, because in this sense all territorial governments are temporary, being alterable by Congress at pleasure,<sup>2</sup> and this particular government may endure for years. Then in what respect is this government incomplete? It has its governor, its judges of local and federal courts, its legislature. It is structurally perfect; it seems to be efficient, and wherein it differs from a complete government is not made clear. If Justice Gray deems it incomplete because, in his opinion, "it is not subject to all the restrictions of the Constitution" (that is to say, apparently, because Congress in the Foraker Act treats Porto Rico as outside the United States in the matters of citizenship and taxation), his sign

<sup>1</sup> See Annexation, p. 116.

<sup>2</sup> See Annexation, p. 125.



of "incorporation" would seem to be not the establishment of civil government at all, but some action by Congress in regard to these other matters.

Are we to infer that, in his opinion, the Constitution is so far at the disposition of Congress that the effectiveness of some of its restrictions in acquired territory depends on the phrasing of an act creating a civil government therein?

At present the theory of "incorporation" lacks the authority of a legal principle, for it is discredited by the opinion and judgment of the Court in the *De Lima* case. At present it does not convey an intelligible suggestion to the statesman, for the method of effectuating it is not made clear. Nevertheless the theory cannot be dismissed merely because of these shortcomings, for a substantial minority of the judges present it as their sole argument for refusing to accompany the judges who dissent in the *Downes* case in their fearless recognition of the breadth of constitutional rights and duties. What powerful motives have begotten this imperfect, but obstructive argument? Supposing it can be made intelligible, is it worth clarifying? Supposing it can be so commended to another judge as to induce him to recant his opinion that Porto Rico is domestic territory, is it worth commending? After the United States have assumed sovereignty over land and people, do their interests demand that the land and the people shall for an indefinite time, possibly forever, remain foreign? Answering in the affirmative, the sponsors of the incorporation theory disclose the apprehensions which have provoked its fabrication.

These apprehensions, are mainly, the disturbance of our economic system, the extending of citizenship to obnoxious persons, the hampering of our activity in war, and the difficulty, if not the impossibility of ridding ourselves of undesirable possessions. Grave apprehensions certainly; but are they at once so real and so cogent as to force the Republic to break its rule of commercial unity, and to introduce class distinctions among its people?

Consider the apprehension in regard to citizenship.

The day before the declaration of war in 1898 the Porto Rican subjects of the King of Spain, upon complying with our general laws, could have entered the United States and begun the process of acquiring citizenship. The day after the conclusion of peace they lost this privilege because they were no longer aliens. Shall they, then, and their children too, be denied citizenship because, forsooth, the United States have become the sovereign of their country? We invited them, as aliens, to come here and become citizens. Shall we go there and deny them citizenship because we gain their allegiance?

This gross discrimination is not manifest, of course, in the case of the Filipinos, for the brown, like the yellow race, is excluded from our statutory color scheme of naturalization, which includes only white and black, but there is really no better reason in law for setting up new standard in the Philippines than there is in Porto Rico.

Justice McKenna appears to dread the "nationalization of savage tribes";<sup>1</sup> but this fear is groundless, for such tribes will be classified with our Indian population.<sup>2</sup> Between the Moros and the Igorrotes on the one hand, and the Filipinos of Manila on the other there may be, indeed, persons difficult to classify. Perhaps an accurate segregation of tribal peoples will leave out many half-civilized persons. With these, as with Filipinos of the better sort, we are undoubtedly in the political fellowship born of a common allegiance to the United States. An unwelcome fellowship, because it means the entrance of an inferior race into the Republic, but, having embraced it, there is no reason why we should shrink from calling our fellow liegemen citizens. It is conceded that important provisions of the Bill of Rights enure as well to the liegeman as to the citizen; indeed it might be difficult to make any substantial distinction in favor of the latter. Then a citizen is not, as such, a member of the political body of the Republic—the electoral body—which is composed exclusively of persons who reside in the States of the Union and meet the requirements of the various State laws conferring the suffrage.

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<sup>1</sup>182, U. S., 219.

<sup>2</sup>See Annexation, p. 57.

True, the Fifteenth Amendment of the Constitution forbids the States to withhold the suffrage from any "citizen of the United States" because of "race, color or previous condition of servitude"; and a Filipino may enter a State in the exercise of his undoubted right of free movement, and, if a citizen, may claim the benefit of the Amendment. But if the State does not wish to give him the suffrage, means for withholding it can probably be devised, though we shall be able to speak more definitely regarding the method after the Supreme Court shall have passed upon State laws intended to disfranchise negro citizens of the United States. If the State does wish to give him the suffrage, it may do so whether he be a citizen or not.<sup>1</sup> There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors.

Comprehending that a "citizen of the United States" is merely one of that vast body of people of both sexes and all ages who owe allegiance to, and enjoy protection from the Republic as their lawful sovereign, it would seem that "fellow liegeman" and "fellow citizen" are not classifications to quarrel over. But Justice White anticipates a peculiar embarrassment from attributing citizenship to the people of our new territory. Prepossessed by the idea that territory is "incorporated" by calling its inhabitants "citizens," he disparages the ability of the United States to sell it, or even to surrender it to its people with suitable conditions regarding administration. He seems to think that if the Philippines are part of the United States, we cannot sell them to a foreign government, which no one now contemplates, nor recognize a local government under our protectorate, to which some look forward as the best settlement of the Philippine question.<sup>2</sup>

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<sup>1</sup> See Annexation, p. 55.

<sup>2</sup> "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.

"But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose

He discusses the question of sale from the premise that selling United States territory means selling citizens, and would accuse those who affirm the power to sell land of holding "that all citizenship of the United States is precarious " and fleeting, subject to be sold at any moment like any " other property. That is to say, to protect a newly acquired " people in their presumed rights it is essential to degrade " the whole body of American citizenship." \* \* \* "In " conformity to the principles which I have admitted," he says, "it is impossible for me to say at one and the same " time that territory is an integral part of the United States " protected by the Constitution, and yet the safeguards, " privileges, rights, and immunities which arise from this " situation are so ephemeral in their character that by a " mere act of sale they may be destroyed."<sup>1</sup>

But has not Justice White already conceded the general effectiveness of the Bill of Rights in the Philippines and thereby attributed to the Filipinos a substantial part of these " safeguards, privileges, rights and immunities"? Would he

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of an incorporated American territory and citizens by the mere exertion of the power to sell be conceded, *arguendo*, it would not relieve the dilemma. It is ever true that where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow then that any conditions annexed to a disposition which looked to the protection of the people of the United States or to enable them to safeguard the disposal of territory would be void; and thus it would be that either the United States must hold on absolutely or must dispose of unconditionally.

"A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine Islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guarantee of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary."—Justice White, *Downes v. Bidwell*, 182 U. S., 317.

<sup>1</sup>182 U. S., 315.

justify a sale of persons thus highly endowed merely because they are not called "citizens"? If selling territory involves selling persons, is not the moral question concerned with the sale of human beings without regard to class distinctions? The corrective for this apprehension is that there is no such thing an ownership, nor, therefore, as a sale of human beings. Territory is the subject of sale, and upon its transfer the inhabitants not allowed, or not accepting the right to retain their old allegiance owe allegiance to the new sovereign.<sup>1</sup> If we bought the Philippines, we did not buy the Filipinos: selling them, we should not sell the Filipinos.

Acceptance of the Philippines as part of the United States will not preclude the future recognition of a protected state, if that shall prove desirable. Given the power to dispose of territory, there is nothing in our Constitution to prevent the making of suitable treaty stipulations with its new government in regard to its administration. The making of these stipulations and their enforcement would lie within the sphere of foreign relations,<sup>2</sup> and they need not contravene any constitutional direction or limitation affecting the domestic concerns of the republic.

Disastrous results are apprehended from an indiscriminate recognition of acquired territory as within the sphere of our uniform revenue system. I have considered this subject elsewhere<sup>3</sup> and have found no insurmountable obstacles to recognizing the constitutional rule of uniformity in such territory. There may be embarrassment to a protective tariff system framed to meet the supposed requirements of our country as it was bounded before the Treaty of Paris, but millions of Americans condemn the whole doctrine of protection, and no one can defend the enforcement of this doctrine, avowedly based upon hostility to, or at best on a selfish disregard of foreign countries against any part of our domestic territory. There is now reason to hope that the general policy of protection is on the eve of abandonment. In the address which proved to be his political testament President McKinley said: "A system which provides a "mutual exchange of commodities is manifestly essential

<sup>1</sup> See Annexation, p. 59.

<sup>2</sup> See Annexation, p. 155.

<sup>3</sup> See Annexation, p. 83.

“ to the continued and healthful growth of our export trade.  
“ We must not repose in fancied security that we can forever  
“ sell everything and buy little or nothing. If such a thing  
“ were possible it would not be best for us, or for those with  
“ whom we deal. \* \* \* The period of exclusiveness is  
“ passed: The expansion of our trade and commerce is  
“ the pressing problem. Commercial wars are unprofitable.  
“ A policy of good-will and friendly trade relations will  
“ prevent reprisals. Reciprocity treaties are in harmony  
“ with the spirit of the times ; measures of retaliation are  
“ not.”<sup>1</sup> These words forecast a more liberal trade policy  
toward strangers. Is it decent to covet the power to dis-  
criminate against a section of our own people ?

In voicing the specific apprehensions we have noted, the judges merely ruffle the surface of the tremendous question provoked by the Treaty of Paris. Whether we call the Filipino a “ citizen,” what shall become of the Dingley Tariff Act, are matters of subsequent and incidental interest to the question whether the acquisition of countries like the Philippines is in harmony with the highest interests and purposes of the Republic.

Here the judges apprehend startling consequences of holding that when we acquire territory we make it part of the United States. “ If the authority by treaty is limited as “ suggested,” says Justice White, “ then it will be impossi-  
“ ble to terminate a successful war by acquiring territory  
“ through a treaty, without immediately incorporating it  
“ in the United States. Let me, however, eliminate the case  
“ of war and consider the treaty-making power as subserving  
“ the purposes of the peaceful evolution of national life. Sup-  
“ pose the necessity of acquiring a naval station or a coaling  
“ station on an island inhabited by people utterly unfit for  
“ American citizenship and totally incapable of bearing their  
“ proportionate burden of the national expense, could such  
“ island, under the rule which is now insisted upon, be  
“ taken ? Suppose, again, the acquisition of territory for an  
“ inter-oceanic canal, where an inhabited strip of island on  
“ either side is essential to the United States for the preser-

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<sup>1</sup> Address at Buffalo, September 5, 1901.

“ vation of the work. Can it be denied, that if the require-  
“ ments of the constitution as to taxation are to immediately  
“ control, it might be impossible by treaty to accomplish  
“ the desired result ?”<sup>1</sup> Justice McKenna says of the prin-  
ciple that an acquisition of land brings it within our general  
taxing district : “ It takes this great country out of the  
“ world and shuts it up within itself. It binds and cripples  
“ the power to make war and peace. It may take away  
“ the fruits of victory, and if we may contemplate the fruits  
“ of disaster it may take away the means of mitigating that.  
“ All those great and necessary powers, are as a consequence  
“ of the argument, limited by the necessity to make some  
“ impost or excise ‘ uniform throughout the United States.’  
“ \* \* \* The terms which may be granted or received  
“ [upon a cession of territory] would be to a certain and  
“ important extent predetermined. Neither we nor the  
“ conquered nation would have any choice in the new  
“ situation—could make no accommodation to exigency,  
“ would stand bound in a helpless fatality. Whatever  
“ might be the interests, temporary or permanent, whatever  
“ might be the condition or fitness of the ceded territory,  
“ the effect on it or on us, the territory would become part  
“ of the United States with all that implies.”<sup>2</sup> Justice  
Brown, by the way, argues in the same vein in support of  
his opinion that congressional action is necessary to effec-  
tuate the Constitution in outlying territory. “ A false step  
“ at this time,” he says, “ might be fatal to the development  
“ of what Chief Justice Marshall called the American Em-  
“ pire. Choice in some cases, the natural gravitation  
“ of small bodies towards large ones in others, the result  
“ of a successful war in still others, may bring about con-  
“ ditions which would render the annexation of distant  
“ possessions desirable. If those possessions are inhabited by  
“ alien races, differing from us in religion, customs, laws,  
“ methods of taxation and modes of thought, the adminis-  
“ tration of government and justice, according to Anglo-  
“ Saxon principles, may for a time be impossible ; and the  
“ question at once arises whether large concessions ought  
“ not to be made for a time, that, ultimately, our own

<sup>1</sup>Downes v. Bidwell, 182 U. S., 311.

<sup>2</sup>De Lima v. Bidwell, 182 U. S., 218.

" theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."<sup>1</sup>

In Justice Harlan's sober rebuke to the last of these arguments we find an answer to all, " Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty."<sup>2</sup> Disrespect for this prudent counsel may some day imperil the welfare, perhaps the existence of the United States; respect for it will never injure their true interests in any quarter of the world.

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<sup>1</sup> *Downes v. Bidwell*, 182 U. S., 286.

<sup>2</sup> Continuing, Justice Harlan says: " A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any Department of the Government to make "concessions" that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or embarrassing circumstances. No such dispensing power exists in any branch of our Government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mindanao, who live on imported rice, would starve, because the import duty is manyfold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this Court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the Government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution." 182 U. S., 384.



Some of the judges who reject this counsel are preoccupied in making, as they think, the best of a bad bargain. In truth, are they not encouraging a policy of indiscriminate expansion by contriving means for avoiding some unwelcome results? They miss the point that the great evils of an improvident acquisition accompany the acquisition itself: The after questions of citizenship and tariffs are comparatively unimportant.

All the judges who perceive in this counsel an hindrance to the progress of the Republic are distracted by imaginary fears. Even with the singular case of the Philippines before us we must refuse to admit that the United States have ever been, or ever will be compelled to acquire territory without first weighing advantage with disadvantage, without considering the effect upon our institutions. Accepting the restraint of this perpetual counsel of prudence we shall not bind ourselves in "helpless fatality," or take ourselves "out of the world," or "stand helpless in the family of nations." Extravagant expressions which, assuredly, are not taken seriously out of court!

If in peace we desire a naval station, or the control of a canal, we may gain sufficient jurisdiction for our purpose without making unwholesome additions to our domestic territory. Nor need such additions follow successful war. Indeed, Justice White would commend his doctrine of acquisition without "incorporation," on the ground that its rejection would still leave the United States free to exercise dominion over territory without making it part of the United States, in other and, in his opinion, less satisfactory ways. "It seems to me," he says, "it is not open to serious dispute, that the military arm of the Government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the civil power to do so would not therefore prevent the holding of territory by the United States if it was deemed best by the political department of the Government, but would simply necessitate that it should be exercised by the military, instead of by the civil power."<sup>1</sup> Again: "It cannot be denied that under the rule

<sup>1</sup> 182 U. S., 342.

" clearly settled in *Neely v. Henkel*,<sup>1</sup> the sovereignty of  
 " the United States may be extended over foreign territory  
 " to remain paramount until in the discretion of the political  
 " department of the government of the United States it be  
 " relinquished. This method, then, of dealing with foreign  
 " territory would, in any event, be available. Thus, the  
 " enthralling of the treaty-making power, which would result  
 " from holding that no territory could be acquired by treaty  
 " of cession without immediate incorporation, would only  
 " result in compelling resort to the subterfuge of relinquish-  
 " ment of sovereignty, and thus indirection would take the  
 " place of directness of action—a course which would be  
 " incompatible with the dignity and honor of the Govern-  
 " ment."<sup>2</sup>

It is true that these courses may be open to the United States at the close of a successful war, perhaps a resort to the second in time of peace is conceivable, and we are not now concerned to discuss their propriety. Had the Treaty of Paris dealt with Porto Rico and the Philippines as with Cuba, they, like Cuba, would lie beyond our domestic territory. Had the Treaty merely secured the relinquishment of Spanish sovereignty over the islands without, as in the case of Cuba, pledging the United States to a temporary occupation, or had it been silent in regard to them, we would certainly in Porto Rico, and I think throughout the Philippines, have acquired a possession for an indefinite term good against the world; still, the territory would not thereby have become part of the United States in any domestic sense. And this separation would have been maintained in the case of the Philippines had the archipelago been left to its people under our protectorate.

None of these courses was taken; and in the course actually chosen the positive reason appears for including the islands within the United States.

Justice White says: "The whole argument in favor of  
 " the view that immediate incorporation followed upon the

<sup>1</sup> 180 U. S., 109, defining the peculiar relation of the United States to Cuba.

<sup>2</sup> 182 U. S., 344.

"ratification of the treaty in its last analysis necessarily comes to this: Since it has been decided that incorporation flows from a treaty which provides for that result when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although the condition to that end has been approved by Congress. That is to say, the argument is this: Because a provision for incorporation when ratified incorporates, therefore a provision against incorporation must produce the very consequence which it expressly provides against."<sup>1</sup>

This cleverly confused statement is not the argument for maintaining that upon the exchange of ratifications of the Treaty of Paris the ceded territory became part of the United States. The real argument rejects entirely the novel theory of "incorporation."<sup>2</sup> It affirms that upon the exchange of ratifications the United States became entitled to full sovereign rights over the ceded territory, whether by force of the Treaty itself, or by its recognition by Congress in the act appropriating money to redeem its pledges is immaterial. These rights were instantly perfected by possession. Thereupon the Federal Government was invested with precisely the same power over this territory as over Alaska and Oklahoma, which, unquestionably, are within the United States. But it is asserted here that the Federal Government has power to fix the status of ceded and accepted territory, and in the Treaty has disclosed its intention to hold the islands apart from the United States.

To support the principle of this assertion Justice White refers to what he calls "The general rule of the law of nations, by which the acquiring state fixes the status of acquired territory \* \* \*."<sup>3</sup> This rule as stated seems to suggest a confusion of ideas. Admitting that a state, having opportunity, may change the status of outlying territory it certainly exerts its power by acquiring the territory:

<sup>1</sup> 182 U. S., 341.

<sup>2</sup> "Great stress is thrown upon the word 'incorporation,' as if it had some occult meaning," says Chief Justice Fuller, 182 U. S., 373. "I am constrained to say," says Justice Harlan, "that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." 182 U. S., 391.

<sup>3</sup> *Downes v. Bidwell*, 182 U. S., 310.

"Acquired territory" means land brought within the complete sovereignty of the acquiring state; the phrase itself denotes status, and this status must be like that of other territory under the same sovereignty. And to this rule of general application I add a special one imposed by our Constitution—that our Congress is the Congress of the United States and of no other country, and the boundaries of its territorial jurisdiction are the boundaries of the United States.<sup>1</sup>

When we realize that in order to determine the status of our new possessions we should rely upon the Constitution, and upon the cessionary clauses of the Treaty of Paris and our acts of acceptance as the controlling factors, we perceive the irrelevancy of the incidental clauses which are supposed to bear upon the subject. Justice McKenna's statement that the Treaty "expressly declares that the status of the ceded territory is to be determined by Congress,"<sup>2</sup> is very careless. The Treaty "expressly declares" nothing of the kind. He refers, presumably, to the clause reserving "the political status and civil rights" of native islanders for the determination of Congress, which is a very different thing. Whatever this clause may mean to persons, it has no effect upon land.<sup>3</sup> Nor is the normal effect of the cessionary clauses perverted by any other provisions which, this effect being maintained, may be superfluous, or even unconstitutional. If, for example, under the ten-year agreements Spain cannot send "Don Quixote" into any of the islands, or a cask of wine into the Philippines free of duty without violating our constitutional rule of uniformity of duties, then the agreements must fall as incidental mistakes (if, indeed, a way can be found to have them condemned by the Courts), rather than thwart the far-reaching consequences of a cession and acceptance of territory.

Perhaps our Commissioners at Paris would have liked to exclude the islands from the United States, possibly they hoped they would do so, but had they been convinced of their duty and ability to acquire territory without

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<sup>1</sup> See Annexation, pp. 26, 27.

<sup>2</sup> 182 U. S., 214.

<sup>3</sup> See *supra*, p. 453.

bringing it within the United States, surely they would have spoken plainly, and not left this vital matter to the perilous chance of argumentative definition.

### III.

The Supreme Court is clearly of opinion that the Constitution is law in acquired territory, so far as its provisions are applicable; and this is, perhaps, as satisfactory a generalization of principle as the advocates of constitutional government in our new possessions should expect. Will the Court give point to this generalization when the opportunity comes to enforce a particular limitation?

The Court has decided that acquired territory is domestic territory. Will it follow the true leading of this decision and, discarding the conflicting minority arguments that prop the judgment in *Downes v. Bidwell*, declare the commercial unity of all domestic territory?

Proclaiming the vigor of our Constitution and defining acquired territory the Court faces the right road. Will it turn into the wrong one?

These encomiums are well deserved, yet the *Downes* judgment, and the apprehensions, perplexities, ambiguities and errors which mar some of the opinions, compel the queries.

Happily, the line of cleavage between approving and dissenting judges in the *Downes* case does not separate Republicans from Democrats. Whilst the judges were concerned directly with Porto Rico in the Insular Cases decided, their minds were intent on the Philippines in discussing the status of persons; and two-thirds of the Democrats seem ready to claim for the brown man the status their party once denied to the black; while two-thirds of the Republicans would deny to the brown man the status their party conferred upon the black. Apparently the line does not separate "broad" from "strict" constructionists of the Constitution, in any former significance of these terms; nor apologists, from opponents of the acquisition of the Philippines; nor, perhaps, protectionists from free traders, though "protection" plays a part in some of the opinions.

The Chief Justice and Justices Harlan, Brewer and Peckham are here distinguished from their brethren by a truer appreciation of the everlasting duty of the Republic—throughout its dominions exemplifying that faith in its principles which shall promote unity and strength at home, and make it respected, imitated and feared abroad.

The united opinion of these judges, so strongly held, so calmly expounded, should yet prevail against the discordant arguments of the majority of the Court, who, at present, are too plainly disturbed by the Philippine adventure to exercise that serene judgment which supports the monuments of law.

“It must be remembered,” says Chief Justice Fuller, at the close of his opinion in the *Downes* case, “that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. \* \* \* They may not indeed have deliberately considered a triumphal progress of the nation, as such, around the earth, but, as Marshall wrote: ‘It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.’ This cannot be said, and, on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.”

CARMAN F. RANDOLPH.

## EXAMINATION OF TITLE TO LAND.

**I**N England there are no lands not held strictly under "tenure," nor any proprietor, as the term is understood by us, except the monarch. In our own land we have adopted the same idea to the extent of holding all title to be derived through grant from the Crown or from chartered royal governments, prior to the Revolution, and later from the Federal or local governments,<sup>1</sup> but the tenure here, particularly since the imposition of succession taxes, is, technically, free and common socage in great part, though ownership is allodial, and to all intents and purposes absolute, and the liability to escheat still exists.

Estates tail and primogeniture have been, as such, very generally expressly abolished—in many States they have never existed—and the period of limitations somewhat modified; distinctions and invalidities in future estates, arising from the form of the instrument creating them or from the artificial relation of some prior or future estate, have been abolished where such estates are not in contravention of the one test rule governing a suspension of the power of alienation; and the highly artificial legal fictions constituting the English uses and trusts have been pared down (so far as the courts would allow) to a very simple system of legally enforceable beneficial interests, governed by the laws of their creation, equally regulating the legal estates of which they had formerly been but the shadows.

But tenancy, joint, and by the curtesy, dower, lease, mortgage, and other rights and incidents of ownership of land are retained; and the forms of devolution of title by descent, devise, voluntary conveyance and involuntary conveyance (by fiction of law), are still the same, with some modifications owing to the peculiarities of local law.

Freedom of alienation has always existed in this country, and simple forms of conveyance have been usual.

The common English form of conveyance, by lease and release, devised to avoid enrolment or the ancient livery

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<sup>1</sup> 3 Kent's Com., 377, 378.

of seisin, though practicable, has never been popular here; and there has prevailed a form of deed in the nature of bargain and sale, with various additions in the nature of assurance, for a long time increasing in verbiage and volume, but later, by statutory enactment, as in the State of New York, much curtailed.

The registry or recording acts as they are generally known, have greatly varied if not diminished the labor of title examination, and but for their perhaps too great extension by the courts (as in the case of assignments of mortgage, which were not originally intended to come within the now extended scope of their operation) have proved perhaps the greatest practical innovation in the law of realty as derived from the mother country.

As respects competency to take and convey title changes have not been great, other than in regard to *femes covert*s, who have been generally, in the modern term, emancipated from their much deprecated classification with infants, lunatics, traitors, felons and the like, and in the cases of aliens and corporations, who—the one at first through a courtesy of nations, later through the growing brotherhood in rights of man; the other through considerations of business convenience—have almost if not quite acquired all the rights of the native-born individual.

In earlier days when the examination of titles first began to develop as a work of professional requirement in England, and to involve the employment of solicitors, and careful investigation of the various documents, possessions, claims and charges on which the title was founded or by which it might be effected or encumbered, one of the first acts of the examining solicitor was to call upon the solicitors of the vendor for an abstract of title, and also a statement of any documents affecting the title or any adverse claims or encumbrances with respect to the same, within their knowledge. Thus early was the attempt made to enforce what is known to us as the doctrine of representation; and, by a further extension of such inquiries to those supposed to have some adverse claim of title or encumbrance, the doctrine of estoppel was inaugurated. This doctrine was apparently extended to the point of binding even infants and *femes covert*s; but probably not to the ex-



tent of establishing an equitable system of transfer of title by these persons, who were expressly excluded from the rights of transfer. The theory was, however, carried so far as to preclude in some cases a mortgagee who, aware of the prospective purchase, stood by and gave no notice of his claim, from ever afterward enforcing it against the vendee. He was conclusively presumed to stand in the light of an accomplice in a fraud.

Further inquiries conducted upon the property itself, and with all persons found in occupancy were also customary. For judgments, decrees and the like, search was made in the places of registration provided in the courts for their docketing when intended to affect land, and in the court rolls, when the property was copy-hold.

It was sometimes considered proper to search, as at the Registry of Westminster, for *lis pendens*, and also for proceedings in bankruptcy and insolvency, annuities, and, in cases where the estate had been entailed or had belonged to married women, for enrolled deeds and acknowledgments.

Beyond these few simple precautions, coupled with the necessity of requiring production and delivery in the original of the various title deeds, but little was required as compared with the intricate system of title examination which has sprung up in America, where almost every property is always for sale, and the visitor greets his host with "What will you take?" and the customary reply is "What will you give?"

The end and aim towards which the examiner's whole effort tends is to satisfy his own judgment upon the ultimate question of the sufficiency of the title offered—its "marketability," as the set phrase seems to be.

It is generally conceded as an abstract proposition that, in the absence of express conditions of waiver or exception by contract, the purchaser is entitled to a good and marketable title. This is reasonable and logical as a primary proposition, for no man can be supposed willing to have agreed to take anything else, unless upon concessions necessarily in mind and which would naturally be expressed in the written agreement of purchase.

When we approach, however, the definition of market-

ability upon which so much depends, we meet with conflicting theories and decisions, as staggering to the mind as the sayings of a number of men all bent upon accord in a common object can well be. "The title should be such," says one, "that if he wish to sell he may be reasonably sure that no flaw or doubt will arise to disturb its market value,"<sup>1</sup> "or mortgageable to a person of reasonable prudence," says another;<sup>2</sup> again, "not to take a title when there is a defect in the record title, which can be cured only by a resort to parol evidence;"<sup>3</sup> or, "depending on a disputed question of fact or a doubtful question of law;"<sup>4</sup> and, "the burden of proof is on the vendor to show that the statute of limitations has cut off claims."<sup>5</sup> All these are broad enough to let out almost any purchaser on any title. On the other hand it is said that "a pending action does not of itself make the vendor's title defective \* \* \* and the burden rests upon the vendee to prove the alleged cause of action;"<sup>6</sup> "if the defect or doubt \* \* \* depends upon some extrinsic fact not discovered by the record, he must prove this fact to justify a refusal to accept the title;"<sup>7</sup> "there is no inflexible rule that a vendor must furnish a perfect record or paper title;"<sup>8</sup> "the burden of proof is on the purchaser to show that the title is defective;"<sup>9</sup> "the mere fact that sufficient time has not elapsed under the statute to protect \* \* \* is held insufficient to justify rejection."<sup>10</sup>

From all these varying and often conflicting decisions as to marketability and as to the burden of proof, we are obliged to try to ascertain some reconciling principle; otherwise we shall be driven back almost upon a mere toss of chance, or the woman's reason, that the title is bad or good "because it is."

<sup>1</sup> *Hatt v. Hagaman*, 12 Misc., 171, citing *Schrivver v. Schriver*, 86 N. Y., 575, *et al.*

<sup>2</sup> *Fleming v. Burnham*, 100 N. Y., 10.

<sup>3</sup> *Moore v. Williams*, 115 N. Y., 586.

<sup>4</sup> *Simon v. Vanderveer*, 84 Hun, 452; this case was reversed later (155 N. Y., 377), but for the time being was supposed to be law.

<sup>5</sup> *Greenblatt v. Hermann*, 144 N. Y., 13.

<sup>6</sup> *Hillreigel v. Manning*, 97 N. Y., 56.

<sup>7</sup> *Moser v. Cochrane*, 12 Daly, 292, *aff'd*, 107 N. Y., 35; *Cambreling v. Purton*, 125 N. Y., 610.

Perhaps a satisfactory test will be found in the suggestion that the subject be approached in each case from one of four points of view :

- I. Where the vendee seeks to avoid.
- II. Where the vendee seeks performance.
- III. Where the vendor seeks to avoid.
- IV. Where the vendor seeks performance.

But space forbids more than this hint as to the possible solution of these apparently conflicting illustrations of a simple and well-settled principle: another instance of the differings of law and equity!

In the recording acts lies the great point of the division between the old-time methods of examining title and the modern. The actual manual delivery of papers, their preservation intact, the several priorities among them, have been done away with or regulated in an orderly manner. At first glance, it would seem that these acts have multiplied the many risks involved in title examination; but this is in fact owing generally to the increased number of interests in land, made possible under the safeguarding of record.

As late as 1851, it is stated of the English laws relative to the public registry of legal instruments, that they were local and of very limited application, while among the United States the practice of record for the purpose of perpetuation existed as early as the colonial period; and in New York State priorities arising among recorded instruments were expressly regulated, certainly as early as 1788.

As already stated, the courts have greatly extended the intended scope of these acts, particularly in respect to inter-classical priorities—the statutes being planned originally to regulate the priorities of the several classes in themselves, and not with respect to various instruments of differing classification, in point of respective priority.

But the subject of priorities arising among recorded instruments of different classes, as well as between those recorded and unrecorded, is far too complex and voluminous to be more than mentioned in an article of general scope.

Besides these questions arising from the recording of instruments, there are different ones relating to the *status* and identity of the various persons concerned in passing down the title from hand to hand. Referring to the question of identity, the writer actually has known of a case where a title held by the wife of a man, in fee, was innocently passed along by a second wife of the same man, who had a similar given name but no title whatsoever to the property. And this undetected for a long period of years!

Questions of existing rights of dower left undisposed of by irregular divorce proceedings, attempted devolutions of title, through minors, aliens and lunatics, are of frequent occurrence. In the latter two classes, however, where legal proceedings sufficient to warn have not already transpired, purchasers without notice of the disqualification are very generally protected.

There are many matters also outside the records, and which are closely connected with or spring from, the very subject of the examination itself—the land. They are such as quantity, location of the lines, encroachments (all of which a competent survey will make clear), latent easements, such as rights of way, underground pipes, rights of support from adjacent building, occupation under claim adverse to the title as disclosed by the records or in modification of the same, unpaid water rates not yet written up, and others of less importance. It is but fair to say, however, that with these counsel rarely concern themselves, often not seeing the property at all, and leaving such matters to be looked up by the client or his surveyor, or neglected, as may be the case. It is claimed that the professional duty is limited in this respect to what the records may disclose—a wide departure from the English system.

Changes in decisions interpreting the law are a danger against which it is impossible to guard. An attorney is generally justified in relying on the decision of an appellate court, but the frequent reversals of the decisions of courts of first instance, render them very unsafe to rely upon. They may be used in sustaining one's own interpretation of the law, but if in conflict with it should only be regarded as warnings to make more certain the determination of the

point in doubt. It is not always that the court will save the title for the sake of conservatism and the great interests involved, though that almost appears to have been the motive in the New York case of *Bertles v. Nunan*,<sup>1</sup> where the demand for a logical determination of the question whether the statute had abolished estates by the entirety (as intimated in a *dictum* of the same court, in the earlier case of *Meeker v. Wright*),<sup>2</sup> was evaded, and the logic of the situation and the plain intent of the statute in question were cast aside to avoid uprooting the construction put upon that law and acted on by the majority of the legal advisers in real estate matters in the State. The same court overset many titles passed under the generally accepted rule laid down by a lower court of appeal in *Wagner v. Hodge*,<sup>3</sup> that a party defendant to a foreclosure suit was before the court in all his capacities or interests, duly cut off as such, by its decision of the later case of *Landon v. Townshend*,<sup>4</sup> holding exactly the reverse.

The irrepressible struggle between law and equity, for the long period of years during which they have flourished apart or in attempted combination, has been also one of the many sources of anxiety to the profession in the examination of title.

With numerous cases before us of adjudications that the set words "legal representatives" may be read "widow and heirs-at-law";<sup>5</sup> the frequent holding and statutory enactment that one of the most solemn instruments in the law, a deed under seal, may be read, in the light of parol evidence, as a mortgage;<sup>6</sup> that the same deed without a seal is only an enforceable contract in equity,<sup>7</sup> yet that the omission of the seal may be disregarded if the words "have hereunto set their hands and seals" precede the signatures;<sup>8</sup> that a mortgage will be construed one way if the

<sup>1</sup> 92 N. Y., 152.

<sup>2</sup> 76 N. Y., 262.

<sup>3</sup> 36 Hun, 524.

<sup>4</sup> 112 N. Y., 93.

<sup>5</sup> *Greenwood v. Holbrook*, 111 N. Y., 465; *Griswold v. Sawyer*, 125 N. Y., 411, *et al.*

<sup>6</sup> Vol. 1, R. S. N. Y., pp. 756, 93.

<sup>7</sup> *Grandin v. Hernandez*, 29 Hun, 399.

<sup>8</sup> *Nesbit v. Albert*, 85 Hun, 212.

appanage of a note,<sup>1</sup> and another if it secure a bond,<sup>2</sup> and be governed in an entirely different way still, if unaccompanied by either;<sup>3</sup> that a mortgage, once paid, may not be revived, though good money pass on the faith of it, as against even a subsequent encumbrancer having notice of its existence and presumed validity,<sup>4</sup> while a mortgage equally dead, and *ab initio*, for usury, is given life and validity to all time by an estoppel certificate<sup>5</sup>—with these and many similar conflicts in mind we are forced back again very sternly into the narrow path of precedent, and to a rigid holding fast to what has been once surely determined, even though the straw be one likely to break or to be torn from the grasp.

It is a legal maxim, that "No will has its brother." Human nature having much that is common to all persons yet asserts its individuality in giving to each person with respect to his estate a will of his own; to each is given his own environment, his own duties, his own preferences and his own ideas with regard to his estate—to distribute it or to perpetuate it. So in regard to real estate titles, made up of wills, of deeds, of equity suits, of passings by descent, no title to real estate has its brother. And no lawyer in active practice can choose the particular real estate title which he will examine, or the particular real estate transaction which he will carry through; he takes what his client sends him. He must be familiar with the whole range of applied real estate law (in his own State at least); with the broad principles as contained in Blackstone and Kent; with the legislation which reiterates those principles or modifies them, or adapts them to later times, or to fit in with other legislation; must know how to weigh the numerous and often conflicting decisions which sustain, modify or overturn these principles, adapt them to subsequent legislation, or distinguish between different and seemingly opposing principles; must be familiar with the practice of the courts as to the manner in which the object

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<sup>1</sup> *Franklin Bank v. Pratt*, 31 Me., 501; *Gould v. March*, 1 Hun, 566.

<sup>2</sup> *Kidd v. Conway*, 65 Barb., 158.

<sup>3</sup> *Matthews v. Sheehan*, 69 N. Y., 585.

<sup>4</sup> *Bogert v. Bliss*, 148 N. Y., 194.

<sup>5</sup> *Weyh v. Bohlan*, 85 N. Y., 394.

sought can be legally accomplished, examining with great care for jurisdictional questions, or the following of particular statutes, where the matter is governed by statute rather than by common law. He must decide, sometimes quickly, and always correctly, all these questions; as to some of which he may rely safely—or to his cost—upon decisions which are “on all fours,” supposedly, with his case; in regard to others using only his own judgment, as in questions of first impression, or involving recent legislation, where there is no decision to aid him, and where too often, in cases of crude legislation, he is called to be the pioneer for others over a path which is full of danger. If an existing decision is not “on all fours” with his case he must quickly and correctly anticipate the Court in its construction of the law. He must be broad, yet having a mind for detail; must be careful but not finical; he must be trustworthy, “not given to disputations,” thoroughly conversant with the title which he is examining or has examined, and not dependent upon others for the details. He must be a good business man, quick and correct at figures, a student of men as well as of books; starting no questions of casuistry against his clients’ interests, not desirous of airing his learning, nor of setting up even the most innocent-looking “man of straw,” in a display argument about what he believes to be an immaterial point against his client’s side of the case. In short, he must be an equity judge off the bench and out of court, anticipating a judge’s decision, sometimes sitting in review even upon the acts of his brother on the bench, ever responsible in loss of practice, and in many ways in which a judge is not, for errors of judgment; and even so he must rely for many facts, as of descent, intestacy, freedom from dower, etc., upon the knowledge of others. He has no light task; he assumes a heavy burden of responsibility.

In early days questions of title were first adjudicated *vi et armis*, next in time by the arbitrament of twelve good men and true on either side—a step from the tourney toward the jury, and savoring of both, in the process of evolution. Then followed the courts of law in the modern acceptance of the term, with their bills, cross-bills, replications and the interminable proceedings in ejectment, drag-

ging through years and through lifetimes—estates in chancery were never dependent on lives!

In the present day the examining attorney must be all that I have said, and more. It is not alone a responsibility to make good his determination before a court—it is rare that he can hope for a fair chance of that sort to defend his work. The old-fashioned ejectment suit, tried and retried, with all the varying views of different justices and courts, changes of circumstance and fact, often occurring in the lapse of time taken up in the trials, and which tossed victory first to one side, then to the other, has gone practically into history. It is the view which the next attorney, following in his footsteps, will take, that “gives him pause”—often an attorney examining for a mortgage loan, and who decides for himself upon the goodness and marketability of the title before him.

Possibly nowhere outside of the profession of arms, where conduct becoming an officer and a gentleman is a subject of every one's individual and collective concern, is there a professional, unofficial court maintaining a critical standard of excellence like that of the *excoram forum* which is composed of members of the legal profession who devote themselves particularly to the intricacies of real estate law and the examination of titles. Not once in ten, perhaps, will a mooted point become the subject of judicial decision—no class of men are more hide-bound in precedent, or more ready to discuss and settle such points among themselves without resort to the courts. A man is greatly upheld, or discouraged, and even often completely overborne, by a very general custom or the consensus of opinion of brother specialists. This arises, very generally, from the fact that clients lack time and courage, or that the circumstances of the case will not permit a resort to the courts. A few adverse comments on the point involved by some specialists consulted on the curbstone, as it were, by the client in question, or the rejection of a title by an irresponsible counsel who is examining for a loan, without the possibility of vindication by a “day in court,” may lose one his client forever.

It is this very necessity for almost infallible accuracy that lends peculiar responsibility to the *ipse dixit* of the real



estate counsel. He can afford to make no mistakes. The seeds of error, sown by him, never fail to spring up in a crop of calamity. It has been said, "The grave conceals many mistakes of the physician, but nothing can prevent the error of an attorney in an examination of title from eventually springing up to confront him—save an early death."

It is not the purpose of the writer to discourage, but to make careful painstaking the every-day and all-day-long rule of him who aspires to pass upon a title to land, so that his certificate of title will *go* in cases whose importance may reach far beyond the limit of the capital of a title insurance company, or even of them all in combination.

EDGAR LOGAN.

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NOTE.—For the purpose of illustration, the cases in reference in this article have been very generally confined to those in the courts of New York State. Decisions of courts of different States have been always very generally in hopeless conflict.

# COLUMBIA LAW REVIEW.

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In the early part of August Professor William A. Keener resigned his position as Dean of the Columbia Law School, in order that he might have more time to devote to his consulting practice and to the writing of legal works. Professor George W. Kirchwey, who succeeds him as Dean, had been elected acting Dean some months prior to Professor Keener's resignation, and served as Secretary of the Faculty of Law throughout the ten years of the latter's administration. Professor Francis M. Burdick has been elected Secretary.

Unfortunate as the necessity for any change must seem to one who recalls the growth of the past decade, it is apparent that the change of administrators involves no change of policy; and the new officers have the hearty liking and confidence of all. That Professor Keener will retain the Dwight Chair of Law and will continue to present his courses as in the past is the subject of earnest congratulation throughout the student body and among the friends of the school. It would be hard to overestimate the loss to the school which his withdrawal from this work would entail.

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We regret to have to announce the resignation of Mr. Philip W. Russell as Business Manager of this REVIEW, made necessary by the pressure of private business. Mr. Russell will continue to serve as one of the Board of Editors; he will be succeeded in the business managership by Mr. Henry R. Conger.

## NOTES.

**DAMAGES FOR MENTAL SUFFERING.**—As a matter of principle, there is perhaps no good reason why the law should not allow damages for mental suffering caused by a wrongful act, when such suffering is unconnected with bodily injury, or physical contact. But by the great weight of authority recovery may not be had in such a case. Freedom from liability does not rest on the theory that no injury has been done, or that such mental disturbance may not follow the act as a probable consequence. Recovery is denied because distress of mind can be measured only by its physical effects; because it is impossible satisfactorily to administer any other rule. The difficulty last named has been experienced in those jurisdictions which allow recovery for mental anguish caused by negligence in the delivery of telegrams. This doctrine has given rise in those states to a great mass of speculative litigation, and has just been cast aside as impracticable by the Supreme Court of Indiana, which has applied it during the past twelve years. *Telegraph Co., v. Ferguson*, 60 N. E., 675.

In cases where there is no immediate personal injury, but where bodily illness follows as a result of sudden fright, some of the objections urged against recovery for fright alone fall to the ground. It has often been held that an action may lie for damage done by an animal frightened by a negligent act apart from physical contact. 1 Beven on Negligence, 78. Yet in the leading case on that point it was held that there could be no recovery where a defendant's negligence caused reasonable terror, and illness ensued. *R'y Com. v. Coullas*, 13 App. Cas., 222 (1888). This decision was handed down by the Judicial Committee and hence is not binding on the English courts. The doctrine announced has been repudiated in Ireland, *Bell v. G. N. R'y Co.*, 26 L. R. Ir., 428 (1890), and has not been followed in the Queens Bench Division. *Wilkinson v. Downton* (1897) 2 Q. B., 57. In 1896 the rule of the *Coullas* case was adopted in New York, the Court declaring that such injuries were too remote to be the subject of compensation. *Mitchell v. Rochester R'y*, 151 N. Y., 107. But inasmuch as the illness was directly traceable to the fright caused by defendant's act, the reason given is not wholly satisfactory.

In Massachusetts where damages for mental distress have been allowed in the case of a trespass upon a burying ground, *Meagher v. Driscoll*, 99 Mass., 281 (1868), or of an illegal eviction from leased premises, *Fillebrown v. Hoar*, 124 Mass., 580 (1878), the Mitchell case has been followed, the Court limiting the application of the doctrine to cases of negligence. *Spade v. Lynn, Ry.*, 168 Mass., 285 (1897). So in two recent New York cases the Appellate Division has held that the Mitchell case does not apply to wilful

torts, and has given damages accordingly. *Preiser v. Weilandt*, 48 App. Div., 569; *Williams v. Underhill*, 63 App. Div., 224.

The soundness of this alleged distinction is not apparent. Whether a wrong be wilful or only negligent, the wrongdoer is liable for such injuries as flow naturally from his act. If damages for the results of mental distress caused by him are too remote in the one case, they must be so in the other. Moreover, if it is inconvenient to award damages for injuries resulting from shock or fright caused by a negligent act, it must be equally inconvenient when the act is wilful. The objection as to the encouragement of speculative litigation applies to both classes of cases. It may be that the disposition to give punitive damages has misled the courts and brought this confusion into their decisions.

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REMOVAL OF CAUSES—PREJUDICE.—In *City of Terre Haute v. E. & T. H. R. Co. et al.*, 106 Fed., 545, C. C. D., Ind., Feb., 1901, the Circuit Court of the United States has recently departed from the view ordinarily accepted of the prejudice and local influence clause of the Removal Statute. It was held that diversity of citizenship, such as would give original jurisdiction to the Circuit Courts, must exist in order that a defendant might remove from the State courts.

Under the Removal Act of 1867, which was not affected by the Act of 1875, it was settled that all the plaintiffs must be citizens of different states from those of all the defendants, and that all parties, plaintiff or defendant, must join in the petition for removal. *Young v. Parker's Adms.*, 132 U. S., 267 (1889). In the Act of 1887 it was provided that, under certain conditions, in a "controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state," might remove on the ground of prejudice and local influence. It was contended that, since the diversity of citizenship which is necessary to give the Circuit Court original jurisdiction was not specifically required, the phrase "being such citizen of another state" would be meaningless, unless some defendants might be of the same state as the plaintiff; *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed., 849 (1888); also, that this provision for remanding the suit would have little application if there were diversity of citizenship. This view was generally adopted by the Circuit Courts. *Bonner v. Meikle*, 77 Fed., 485 (1896); *Jackson v. Pearson*, 60 Fed., 113 (1892). In *Fiske v. Henarie*, 142 U. S., 459 (1892), the question came before the Supreme Court, but the determination of it was expressly avoided, the decision passing off on the ground that the petition for removal was too late.

Inasmuch as under the Statute of 1867 diversity of citizenship was essential, *Young v. Parker's Adms.*, *supra*, and the language used in the Statute of 1887, as amended in 1888, had received a settled construction, *Anderson v. Bowers*, 43 Fed., 321 (1890), and as, further, it was the aim of the statute to cut down the number of cases removable to the Circuit Courts, it would seem that the prin-

cial case is correct. Moreover, the Supreme Court in *In re Pennsylvania Co.*, 137 U. S., 451 (1890), decided that the \$2,000 minimum required to give original jurisdiction to the Circuit Courts applied to cases of removal for prejudice; and it seems logically impossible to construe a part of the section granting original jurisdiction in connection with the prejudice clause and not the whole. *Cf. Jackson v. Pearson, supra.*

**DIVORCE—EFFECT OF FOREIGN DECREE—ESTOPPEL.**—Whether one who has procured a judgment for divorce may, as plaintiff, insist upon rights whose existence depends upon the continuance of the marital relation, in a state where the validity of his decree is not recognized, was the question raised in two recent cases before the New York Appellate Division. In each case the wife, compelled to leave her husband by reason of his abusive treatment, had gone to another state and there procured a divorce by constructive service of process; such decree being without force in New York, under the ruling in *People v. Baker*, 76 N. Y., 78. In one of the cases, *Starbuck v. Starbuck*, 64 App. Div., the plaintiff sued for dower and the Court in the Second Department declared that the fact that she had obtained an *ex parte* divorce in Massachusetts did not preclude her from asserting her claim as widow. In the other case, *In re Swales*, 60 App. Div., 599, which was tried in the Fourth Department, an opposite conclusion was reached and the petition of the wife for letters of administration upon the estate of her deceased husband was dismissed, the Court holding that, having sought and obtained a judgment for divorce in Illinois, she could not afterwards enforce a claim against her husband's estate based upon a denial of the jurisdiction of the Court whose aid she had herself invoked. Apparently the Court of Appeals has never passed upon the merits of this rule. The case of *In re Kimball*, 155 N. Y., 62, is quite similar on its facts to these two cases but the question is not touched upon in the decision. In the reports of the lower courts there are decisions both ways. The principle involved has found favor in a number of our states; as the Court in the *Swales* case suggests, it has many of the elements of estoppel; it certainly seems reasonable and likely to make for justice. Should the court of last resort accept this doctrine, the effect on our state divorce law will be material.

**TORTS—PUBLIC CHARITY—HOSPITAL'S LIABILITY TO PATIENT.**—What is the liability of a public hospital to a patient injured by the negligence of a nurse, in whose selection the hospital authorities have used due care? And, if there be none, on what theory of law is this immunity to be supported? The case of *Powers v. Massachusetts Homoeopathic Hospital* (see RECENT DECISIONS, p. 495), holds that there is no liability, even though the patient make small payments for his treatment. The ground of the decision is that the rule *respondeat superior* has no application to such a case.

It is well settled that charitable institutions are not liable for the negligence of their carefully chosen servants. *McDonald v. Hospital*, 120 Mass., 432 (1876); *Boyd v. Ins. Co.*, 120 Pa. St., 624 (1888); *Haas v. Missionary Society*, 6 N. Y. Misc., 281 (1893); *Downes v. Harper Hospital*, 101 Mich., 555 (1894). Nor do the small payments made by the plaintiff alter the case. There was no contract. The amount was based on his ability to pay, not on the cost of the treatment given. He partook of the charity and made a small contribution thereto. *McDonald v. Hospital, supra*; *Downes v. Hospital, supra*.

Despite this agreement in the result, there is conflict in the grounds of decision. The authorities above cited held that the funds of a hospital are trust funds, inviolate, and not to be diminished by any such casualties. The principal case, on the other hand, departs from this doctrine and merely holds that the maxim *respondeat superior* does not apply under such facts. Of these rules the latter is preferable. If the funds of such institution be without the reach of damages for one tortious act, they should be equally so for all tortious acts, granted that such acts are not *ultra vires*. If a charitable corporation is to escape liability for the negligent acts of its authorized agents, because the funds were not given for the payment of damages, so should a like corporation escape liability for injury caused by the fall of a decayed wall, or by a defective sidewalk, or by a breach of contract. But the cases hold otherwise. *Reclor, etc., of Ascension Church v. Buckart*, 3 Hill, 193 (N. Y., 1842); *Blaechinska v. Howard Mission*, 56 Hun, 332 (N. Y., 1890).

Therefore, it seems that the reason given for the holding in the principal case is better; viz., the inapplicableness of the rule *respondeat superior* to such facts. The rule has its foundation in the exigencies of society, in public policy and convenience; Pollock on Torts, 5th Edition, p. 72; Story on Agency, 9th Edition, § 452; these require that a man in the management of his own affairs shall so conduct himself as not to injure his neighbor, and that he shall not escape this obligation by turning his business over to a servant and pleading that the latter's negligent acts were unauthorized. *Farwell v. Boston, etc., Ry. Co.*, 4 Metc., 49 (Mass., 1842). On the contrary, where the act is for the master's benefit, and, in the course of the servant's employment, "it will be intended that the servant had authority, it being for the master's benefit." *Tuberville v. Stampe*, 1 Ld. Raymond, 264 (end of 17th century). To the same effect are *Hall v. Smith*, 2 Bing., 156 (1824); *Ellis v. Sheffield Gas Consumers*, 2 E. & B. (1853); *Barwick v. English Joint Stock Bank*, L. R., 2 Exch., 264 (1867). The report of the latter case is misquoted in the principal case, the portion of the opinion quoted reading in the original, "the master is answerable for every such wrong of the servant as is committed in the course of the employment, for *the master's benefit*, though no express command or privity" (not "end or profit," as it is quoted), "of the master be proved." See page 265.

But while public policy requires that a man should himself bear

the burdens of that from which he expects to derive a benefit, so also does that same public policy require that those institutions whose sole object is the benefit, not of themselves, but of their neighbors, be encouraged in their work by freedom from the burdens of a rule within whose reason they do not come. As the Court said in *Hall v. Smith*, *supra*, at page 159, "if the rule *respondeat superior* were applied to such Commissioners [unpaid Road Commissioners], who would be hardy enough to undertake any of those various offices by which much valuable, yet unpaid, service is rendered to the country? \* \* \* Such Commissioners will act no more if they are to make amends from their own fortunes for the conduct of such as must be employed by them." The reasoning is as forceable in the case of a public charity.

It is to be noted that the case of *Glavin v. R. I. Hospital*, 12 R. I., 411 (1879), is *contra* the general rule; but that *Ward v. St. Vincent's Hospital*, 39 App. Div., 624 (N. Y., 1899), is decided on the ground of an express contract and is not in point.

## RECENT DECISIONS.

**AGENCY—CREATION OF THE RELATION BY ESTOPPEL—LIABILITY IN TORT.** Where the defendant advertised itself as carrying on the practice of dentistry at its department store, and the plaintiff, owing to the negligent work of the dentist was injured, *held*, the defendant was liable in damages, being estopped from denying the agency of the dentist, who in fact carried on the practice on his own account. *Hannon v. Siegel-Cooper Co.*, 60 N. E. 597 (N. Y., June, 1901).

This case is a logical outcome of the doctrine of estoppel as applied in cases of agency involving a contractual relation; as where A, having held B out as his agent, and B, having contracted with C, A is not allowed to deny that B is his agent in an action on the contract. *Tier v. Lampson*, 35 Vt. 197 (1862); *Thurber v. Anderson*, 88 Ill. 167 (1878). This doctrine holds in cases where the alleged principal is a corporation. *Kiley v. Forsee*, 57 Mo. 390 (1874); Ang. & Ames on Corporations, § 284. Cases of a similar nature can rarely arise in the law of torts, as one of the elements of estoppel, an act done by the plaintiff in reliance on defendant's representation, is wanting. But in the principal case, plaintiff, in employing the dentist, relied on the character and business standing of the ostensible principal, thus furnishing the grounds for holding defendant liable.

There is no defense in the fact that the act leading to the injury was beyond the corporate authority. See *Bissel v. R. R. Co.*, 22 N. Y. 258 (1860), particularly the opinion of SELDEN, J., at pp. 305 and 306.

**BILLS AND NOTES—CERTIFICATES OF DEPOSIT—GIFTS WITHOUT DELIVERY.** The plaintiff sued on several certificates of deposit alleged to have been given him by a relative. There had been an assignment in writing, not under seal, but the donor had never delivered the instruments to the plaintiff. *Held*, the plaintiff was entitled to the certificates and might recover. *Cowen v. National Bank*, 63 S. W. 532 (Texas, June, 1901).

This decision illustrates the great change which has taken place in the law relating to gifts of choses in action. In England the donee of a bond to whom it has been delivered has been held to have no claim against the obligor. *Edwards v. Jones*, 1 M. & C. 226 (1836). This doctrine seems sound on strict common law principles. By an anomaly, recovery is allowed in gifts *causa mortis*. *Snellgrove v. Bailey*, 3 Atk. 214 (1744). In the United States the donee is held to have an irrevocable right in all cases where there has been a delivery; *Grover v. Grover*, 24 Pick. 261 (Mass., 1837); and a deed of gift without delivery is quite as effectual. *Walker v. Crews*, 73 Ala. 412 (1882). In the principal case the decision depends upon a statute providing that the omission or addition of a seal shall not affect the force of an instrument in writing. Texas Rev. St., § 4862.

**CARRIERS—LIMITATION OF LIABILITY—SPECIAL CONTRACT.** A shipper accepted from defendant railway company without objection a bill of lading containing limitations on common law liability. *Held*, as there was but one contract and one rate open and offered to the shipper, the limitation on liability was without consideration and void. *Illinois Central Ry. Co. v. Lancashire Ins. Co.*, 30 So. 43 (Miss., April, 1901).

The common carrier may limit his liability by special agreement; *N. J. S. Nav. Co. v. Mer. Bank*, 6 How. 244 (U. S. 1848); and there is no well-founded doubt but that the tender by the carrier, and acceptance by the shipper, of a bill of lading creates a contract according to its terms without inquiring whether it has been expressly assented to by the shipper, if there has been no fraud or imposition. *Grace v. Adams*, 100 Mass. (1868).



Nor is there any duty on the carrier to offer to carry with his common law liability. If it were the intention of the shipper to hold the carrier as insurer, "he should have said so, and have either declined to employ him, or have sued him for his refusal, after tendering a reasonable sum for his services and risk." *Hutchinson on Carriers*, Chicago, 1891, § 240; *McMillan v. Ry. Co.*, 16 Mich. 80 (1837).

Though this contract may be attacked for want of consideration, by showing that maximum rates were charged for limited liability or otherwise, *Bissel v. N. Y. C. Ry. Co.*, 25 N. Y. 449 (1862), yet there is a presumption that the contract is for the mutual benefit of the parties and good. *Hutchinson on Carriers*, § 225; *McMillan v. Ry. Co.*, *supra*; *Huntington v. Dinsmore*, 4 Hun 66 (N. Y., 1875).

**CONFLICT OF LAWS—PRESUMPTION OF FOREIGN LAW.** Plaintiff, injured by a fellow-servant in Illinois, sued in Wisconsin, where statute permitted recovery. *Held*, in the absence of proof to the contrary, the existence of a like statute in Illinois would be presumed. *McCarthy v. Whitcomb*, 85 N. W. 707 (Wis., April, 1901).

In all cases the foreign law will be administered as it is proved, or as without proof it may reasonably be presumed, to be. So without proof "courts" of one state will "presume that the general principles of the common law, which we consider to be consonant with wisdom and justice, prevail" in another state. 1 *Greenleaf on Evidence*, 14th Edition, § 43, n. 1; *Seaward v. Columbia Navigation Co.*, 84 N. Y. 48 (1881).

"But no such presumption exists as to the positive statute law of the state. There is generally no probability in point of fact, and there is never any presumption of law, that other states or countries have established . . . the same arbitrary rule, which the domestic legislature has seen fit to enact." *Whitford v. Panama Ry. Co.*, 23 N. Y. 465 (1861), *per* DENIO, J.; *McDonald v. Mallory*, 77 N. Y. 574 (1879); *Murphy v. Collins*, 121 Mass. 6 (1877); *Hall v. Augustine*, 23 Wis. 383 (1868). In the latter case the same court refused to presume the existence in another state of the Wisconsin statute against usury, on the ground of its penal character. Yet the presumption in the principal case is hardly less violent than would have been that refused in 1868.

**CONTRACTS—CHARITABLE SUBSCRIPTIONS—CONSIDERATION—PAROL EVIDENCE.** "In consideration of founding a college" defendant gave the plaintiff a promissory note for \$500. In an action on the note, wherein the defendant pleaded want of consideration, *held*, between the immediate parties to a note, as in this case, parol evidence may be given of the consideration; and, since this evidence showed that the plaintiff had suffered a detriment at the request and in reliance on the promise of the defendant, the note was valid. *Keuka College v. Ray*, 60 N. E. 325 (N. Y., May, 1901).

Although this case may be regarded as showing a readiness on the part of the New York courts to find a consideration in such cases when possible, it nevertheless adheres to the doctrine of *Presbyterian Church v. Cooper*, 112 N. Y. 517 (1889), to the effect that so-called subscription contracts are void. For a recent illustration of the contrary doctrine, of which *Sherwin v. Fletcher*, 168 Mass. 413 (1897), is the leading case, see *First Universalist Church v. Pungs*, 86 N. W. 235 (Mich., May, 1901).

**DAMAGES—MENTAL SUFFERING.** The plaintiff sued for damages for wilful assault. Because of a defect in the bill of particulars he was precluded from proving physical injury resulting directly from the assault. Evidence was offered as to sudden terror and illness caused thereby, but this the trial Court excluded, dismissing the complaint. *Held*, the exclusion was erroneous, damages for such suffering being recoverable when caused by wilful tort. *Williams v. Underhill*, 63 App. Div. 224 (N. Y., July, 1901). SEE NOTES, p. 483.

**DAMAGES—MENTAL SUFFERING—TELEGRAPH CASES.** The Supreme Court of Indiana has affirmed the decision of the Appellate Court and rejected the rule allowing recovery of damages for mental suffering, caused by failure to deliver telegrams, adopted in *Reese v. Tel. Co.*, 123 Ind. 294 (1889), and followed in that state during the past twelve years. *Western Union Tel. Co. v. Ferguson*, 60 N. E. 675 (May, 1901). The decision of the lower court is noted and commented upon in 1 COLUMBIA LAW REVIEW, 327. SEE NOTES, p. 483.

**DOMESTIC RELATIONS—DIVORCE—CONDONATION—REVIVAL.** In a suit for absolute divorce brought by the wife it appeared that she had condoned the defendant's adultery. *Held*, subsequent cruel treatment by the husband, though not in itself ground for divorce, revived the condoned offense. *Fisher v. Fisher*, 48 Atl. 833 (Md., April, 1901).

In England and in some of our states the question involved in the principal case is dependent upon the construction of statutes. Elsewhere the courts have generally adopted the rule announced here. *Johnson v. Johnson*, 14 Wend. 637 (N. Y., 1835). If the effect of condonation could be destroyed only by a repetition of the same offense or by an act of equal gravity, the doctrine of revival would be of but small importance. Forgiveness is treated as having been granted upon the implied condition that, in the future, the other party will observe strictly the duties incident to the marital relation. 2 Greenl. Ev., § 53.

**DOMESTIC RELATIONS—DIVORCE—FOREIGN DECREE—DOWER.** Plaintiff sued alleged widow of plaintiff's first husband to recover dower in his lands in New York. It appeared that after living together for several years in that state, she had been compelled to leave him because of his cruelty. She acquired a *bona fide* domicile in Massachusetts and procured a decree of absolute divorce on the ground of cruelty. He subsequently remarried in Pennsylvania and died leaving real estate in New York acquired since the time of the judgment for divorce. In this property both women claimed dower rights. *Held*, the decree of divorce being invalid in New York for want of personal service on, or appearance by, the husband, the plaintiff was entitled to dower. *Starbuck v. Starbuck*, 64 App. Div. (N. Y. Second Depart., July, 1901). SEE NOTES, p. 485.

**DOMESTIC RELATIONS—DIVORCE—FOREIGN DECREE—ESTOPPEL.** The petitioner prayed for letters of administration upon the estate of her first husband. After living together in New York for some time subsequent to their marriage, the plaintiff left her husband because of his habitual intoxication, went to Illinois and there secured a decree of absolute divorce upon substituted service of process on the ground above named. Later she returned to New York and married a second time. *Held*, the petition must be dismissed, the plaintiff not being allowed to impeach the judgment which she had herself obtained. *In re Swales*, 60 App. Div. 599 (N. Y., April, 1901). SEE NOTES, p. 485.

**DOMESTIC RELATIONS—HUSBAND AND WIFE—TENANCY BY THE ENTIRETY IN PERSONAL PROPERTY.** Money deposited in the K. bank, charged to the joint account of husband and wife, was drawn out by the latter, who paid it over to the F. bank, taking a certificate of deposit payable to herself and husband. *Held*, the transaction created an estate by the entirety. *Brewer v. Bowersox*, 48 Atl. 1060 (Md., Feb., 1901).

This decision raises a question which has been touched upon by very few cases. Mr. Bishop says that there can be no such estate in personal property, though he cites only one case in support of this view. 1 Law Mar. Women, § 212. Mr. Freeman in his work on Cotenancy (§ 68) takes a different position, but his authorities are not convincing. It is difficult to see how such a tenancy could exist at common law, since the husband took title to all his wife's chattels, and had the right to reduce to possession all her choses in action. It is true that several English cases, following the lead of *Atcheson v. Atcheson*, 11 Beav. 485 (1849), hold to the contrary, but these decisions were in equity, where the inter-

ests of married women were jealously guarded. In our country, most of the cases cited as being in accord are those in which the property held was connected with, or derived from, real estate held by the entirety. The importance of distinguishing between such a tenancy and a joint ownership lies in the rule governing the former relation, which forbids each party to alien his interest or to lessen in any way the value of the *res* during the life of the other party.

Where, as in most jurisdictions, the common law disabilities of married women have been abolished by statute, there would seem to be no impediment in the way of the doctrine laid down in the principal case. The same rule has been adopted in Pennsylvania. *In re Parry's Estate*, 188 Pa. St. (1898).

**EQUITY—JOINDER OF PARTIES—MULTIPLICITY OF SUITS.** A number of property owners joined in a bill to restrain the operation of a neighboring mill at night-time, and respondent moved for dismissal on the ground of misjoinder of parties. *Held*, there was no misjoinder, since all of the parties claimed relief under the same state of facts and the remedy was identical. *Whipple v. Guile*, 48 Atl. 935 (R. I., April, 1901).

The bill of peace in the principal case was granted to avoid a multiplicity of suits. All of the parties suffered by the running of the mill and sought the same relief. No question as to misjoinder of parties would have arisen had it not been for the case of *Jones v. Del Rio*, 1 Turn. and R. 297 (Eng. 1823), where the parties besides seeking one identical remedy each sought special relief, and so no common decree could be given. In *Hudson v. Maddison*, 12 Lim. 416 (Eng., 1841), a case on all fours with the principal case, the decision of the *Jones* case, *supra*, was wrongly followed. These two decisions were upheld in *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75 (1865), although the bill there might have been dismissed on the ground that each plaintiff, in addition to one common remedy, prayed for special relief. *Fogg v. R. R. Co.*, 20 Nev. 429 (1890), was decided on similar grounds. In accord with the principal case are: *Gillespie v. Forest*, 18 Hun 110 (N. Y. 1879); *Sullivan v. Phillips*, 110 Ind. 320 (1887), and *Rowbotham v. Jones*, 47 N. J. Eq. 337 (1890).

**EQUITY—THE RIGHT OF PRIVACY.** The defendants, without authority, used the likeness of the plaintiff in an advertisement and posted 25,000 copies of it in various stores, warehouses and saloons throughout the county, but particularly in the neighborhood of her residence, causing her great humiliation, and ultimately severe nervous illness. *Held*, she is entitled to an injunction and damages. *Robeson v. Rochester Folding Box Co., et al.*, 64 App. Div. 30 (N. Y., July, 1901).

Mr. Justice RUMSEY, who wrote the opinion of the Court in this case, supports the conclusion reached by a very able argument: The jurisdiction of equity to protect one from injury is not dependent upon the existence of any right of property; but even if that were not true, there is a right of property in one's own body which the courts will guard, though physical beauty or peculiarity may not in the given case have been used for pecuniary profit.

Whatever may be thought of the attempt made in the second part of this argument to sustain the present holding on grounds well recognized in the older authorities—and certainly the case bears some analogy from this point of view to *Gee v. Prilchard*, 2 Swanst. 402 (1818)—the first proposition, that equity will protect rights other than those of property, represents, it is believed, a distinct advance in equitable doctrine, and one which must ultimately win general recognition. The existence of this right of privacy was admitted in *Schuyler v. Curtis*, 147 N. Y. 434 (1895), and the Court, in its adverse decision, merely held that there was in fact nothing that could be reasonably called an injury to the plaintiff's feelings. That case is also well distinguished, together with *Atkinson v. Doherty*, 121 Mich. 372 (1899), on the ground that the right dies with the person.

The authorities are collected in *Atkinson v. Doherty, supra*. See

also the article by Samuel D. Warren and Louis D. Brandeis in 4 Harv. L. Rev. 193, and *The N. Y. Law Journal*, Sept. 23 and 24, 1901.

**INSURANCE—WAIVER OF CONDITION.** A warranty in a policy that a continuous clear space of 100 feet should be maintained between lumber insured and any dry kiln was violated to the alleged knowledge of the company's agent. *Held*, the property being easily movable, if the agent had knowledge of conditions, there was a waiver of the clause only to the extent of allowing a reasonable time to comply with the provisions of the policy. *Hartford Ins. Co. v. Post et al.*, 62 S. W. 140 (Texas, 1901).

Under the New York rule, which is generally adopted, the knowledge of an agent to obtain information is the knowledge of the insurer, and facts known at the inception of a policy, which are violations of warranties, the insurer is presumed to waive. Otherwise fraud would be imputed to the insurer. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434 (1877). This equitable doctrine imposed by the courts has, so far as is known, never been limited as in the principal case. In warranties looking to the maintenance of certain conditions this introduces a new element which does not seem to be logically involved. The same principle might clearly have been applied in *McGuirk v. Hartford Fire Ins. Co.*, 56 Conn. 528 (1888), and *Short v. Home Ins. Co.*, 90 N. Y. 16 (1883).

**PLEADING AND PRACTICE—REMOVAL OF CASES—PREJUDICE.** In an action by a citizen of Indiana against a citizen of Indiana and a citizen of Ohio, the defendant, a citizen of Ohio, filed a petition for removal to the Circuit Court. *Held*, there must be diversity of citizenship between all parties, plaintiff and defendant, sufficient to give the Circuit Court original jurisdiction under Section 1 of the Removal Statute. *City of Terre Haute v. Evansville, etc., Ry. Co.*, 106 Fed. 545, Feb., 1901. (SEE NOTES *ib.* 484).

**PROPERTY—CONVERTING REALTY INTO PERSONALTY.** Defendant purchased from plaintiff land on which there lay bricks and lumber, which were the remains of a building recently destroyed by fire, and which the plaintiff had evinced no intention to remove. *Held*, the bricks and lumber passed with the land, so that plaintiff could neither remove them from the land after the sale, nor hold the vendee accountable for them. *Guernsey v. Phinzy*, 39 S. E. 402 (Ga., July, 1901).

This decision is sound, and illustrates well the fact that intention plays an important part in determining, not only the validity of contracts, but the character of property as well. Whatever has once been realty remains realty until the owner shows an intention, not only to sever it from the land, but also to convert it into personalty. *Brackett v. Goddard*, 54 Me. 309 (1866).

**PROPERTY—TRESPASS—DAMAGES.** Where defendant erected a viaduct 24 feet high and 59 feet wide, and was sued by an abutting owner for damages to the fee of the street as well as injury to easements of light and air, *held*, although defendant owned 24 feet in fee, and had acquired a prescriptive right to maintain a tunnel 61 feet in width, there was a trespass, and plaintiff was entitled to damages caused by the whole structure. *Siegel v. N. Y. & H. R. Co.*, 70 N. Y. Sup. 1088 (App. Div., June, 1901).

The majority of the Court based its decision on the ground that the partial trespass rendered the whole structure illegal, and that there was a practical difficulty in apportioning damages. McLoughlin, J., dissenting, pointed out the fact that, even if there were a trespass in part, that would be no reason for awarding damages as to the whole, as in *Birrell v. R. R. Co.*, 41 App. Div. 506 (1899), a case involving similar features. The case of *Conabeer v. R. R. Co.*, 156 N. Y. 474 (1898), cited in the principal case, would seem to be controlling. On a similar state of facts, the holding of the Court was that the lands of the abutting owner were burdened by the easements of defendant, and that the increase in the width

of the structure was an incident in the running of the railroad, hence contemplated in the original dealings between the parties.

**QUASI CONTRACTS—PLAINTIFF WILLFULLY IN DEFAULT UNDER CONTRACT.** Where the plaintiff abandoned without sufficient cause an oral contract to clear lands, *held*, he could recover the value of his services on *quantum meruit*, leaving the defendant to recover damages for the plaintiff's default. *Wankscaffe v. Pontoja*, 63 S. W. 663 (Texas, May, 1901).

On principle, in cases of this kind the plaintiff's willful default should preclude any recovery whatever. *Stark v. Parker*, 2 Pick. 267 (Mass., 1824); *Lantry v. Parks*, 8 Cow. 63 (N. Y., 1827) *cf. Forbes v. Watkins*, 62 S. W. 36 (Tenn., Jan., 1901). But, assuming the right to recover, the proper measure of recovery was not adopted. The true basis, it would seem, is a *quantum meruit*, not to exceed the contract price, less the defendant's damage. *Atkins v. Barnstable*, 97 Mass. 428 (1867); *Blood v. Wilson*, 141 Mass. 25 (1886). In the principal case the defendant was left to recover his damages from the plaintiff. In this respect the decision is against the great weight of authority, for in almost all jurisdictions, whether a *quantum meruit* or the contract price is adopted as a basis of recovery, the defendant's damage is deducted. *Standard Gaslight Co. v. Wood*, 61 Fed. 74 (C. C. A., 1894); *Bedow v. Tonkin*, 59 N. W. 222 (S. D., 1894); *Yeats v. Ballentine*, 50 Mo. 530 (1874); *Kane v. Stone Co.*, 39 Ohio State 1 (1883); *Dermott v. Jones*, 2 Wall. 1 (1864).

**SALES—CONTRACT TO SELL—REFUSAL TO PURCHASE—RESALE—VALIDITY—DAMAGES.** Plaintiff contracted to sell certain personalty to defendant. The latter refused to complete the purchase; whereupon plaintiff gave defendant written notice, and advertised sufficiently that the property was open to inspection, and would be sold at public auction. At the auction the plaintiff, who acted throughout in good faith, bought in the property as highest bidder. In a suit by plaintiff against defendant for the difference between the contract price and the market value, *held*, the sale was valid, the amount obtained by it was lawful evidence of the market value of the property, showing substantial loss by the plaintiff, and, therefore, the direction of a verdict for nominal damages only was error. *Ackerman v. Rubens*, 60 N. E. 750 (N. Y., June, 1901).

This decision establishes the doctrine in New York that an unpaid vendor, as agent of his vendee, may, under the circumstances given above, sell to himself. A majority of the Court considered itself forced to this conclusion by *Moore v. Potter*, 155 N. Y. 481; but, as pointed out in the dissenting opinion of the present case, the sale in that case was to a third person; at least, the allegation of the plaintiff charging collusion was not sufficiently supported by the evidence on that issue to take the question to the jury.

However this may be, this decision is open to the metaphysical objection that a person cannot contract with himself, and in a violation of the almost universal rule that, for reasons of public policy, "a trustee or agent to sell shall not become himself a purchaser." *Jackson v. Van Dalfen*, 5 Johns. 43 (N. Y. 1809); *Michoud v. Girod*, 4 How. 503 (U. S. 1846); *Eldridge v. Walker*, 60 Ill. 230 (1871).

**STATUTES—NEW YORK CIVIL CODE—RIGHT TO INTERVENE IN ACTION FOR MONEY JUDGMENT.** Under § 452 of the Code of Civil Procedure, providing "that one having an interest in the subject-matter of a suit may have himself made a party by proper amendment," one D, in a suit in which a money judgment was sought, applied to be brought in as a defendant. *Held*, that the Court has no power to compel the plaintiff to bring in a third party as a defendant, the suit being one for a money judgment only, and title to property not being involved. *Bauer v. Dewey*, 60 N. E. 30 (N. Y., April, 1901).

The principal case follows the decision of *Chapman v. Forbes*, 123 N. Y. 532 (1890), where the Court interpreted § 452 of the Code as being applicable only in cases of an equitable nature, and refused to allow a third party to intervene, as the suit was for a money judgment only.

The part of that section quoted above was held not to apply, as the intervenor could not be said to have an interest in the subject-matter, a debt. It had been supposed that the later cases of *Rosenberg v. Solomon*, 144 N. Y. 92 (1894), and *Hilton Bridge Co. v. N. Y. C. R. R. Co.*, 145 N. Y. 390 (1895), had modified the ruling in the Chapman Case, *supra*. In the Rosenberg Case plaintiff brought an action of replevin, and the intervenor claimed title to the subject-matter. His petition was granted on a strict interpretation of § 452, as title to specific property was involved. The Bridge Car Co. Case was an action to foreclose a mechanic's lien, an equitable action; hence, by granting the petition, the Court merely followed the Chapman Case.

**TAXATION—PERSONALTY—SEAT IN THE NEW YORK STOCK EXCHANGE.** N. Y. Laws of 1896, c. 908, § 7, reads as follows: "Non-residents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state." Construing this statute, the Court held a seat in the New York Stock Exchange is not taxable as personal property held by a non-resident, either (1) because it is neither capital invested in business nor personal property within the restricted definition of the tax law, Laws of 1896, c. 908, § 2 (*BARTLETT, GRAY and WERNER, J.J.*); or (2) because, while it is capital invested in business, it does not come within the definition aforesaid (*PARKER, C.J., VANN, MARTIN and CULLEN, JJ.*). *People ex rel. Lemmon v. Feitner et al.*, 60 N. E. 265 (Apr., 1901).

**TORTS—MASTER AND SERVANT—ASSUMPTION OF RISK OF EMPLOYMENT.** The plaintiff was employed to run a machine in the defendant's factory. Noticing a defect, he informed the defendant that he would do no more work till repairs were made. The defendant promised to have the defect remedied, and directed the plaintiff to resume work and run the machine as carefully as possible. Plaintiff did so and was injured. *Held*, whether or not the plaintiff reassumed the risk of the employment was a question of fact, and a verdict in his favor will not be disturbed merely because the facts might warrant a contrary inference. *Dempsey v. Sawyer*, 49 Atl. 1035 (Me., May, 1901).

When a servant enters into an employment, he is held to assume the risks incidental to such employment. But when, as in the principal case, the servant has notified the master of the increased risk, he has expressly refused to assume such risk. The difficulty arises in determining the intention of the parties on the servant's returning to work at the dangerous machine. The rule would seem to be that within a reasonable time for the repair of the defect the servant has not reassumed the risk, but is acting in reliance on the master's promise to remove the danger; *Illinois Steel Co. v. Mann*, 48 N. E. 417 (Ill., 1897); but, if such reasonable time has elapsed and the servant continues to work, although no repairs have been made, it shows an intention to assume the risk. *Counsell v. Hall*, 145 Mass. 468 (1888).

**TORTS—MASTER AND SERVANT—SAFE PLACE FOR WORK.** Where the defendant telephone company, under a license, strung its wires upon the poles of another company, he, the defendant, was under a duty to servants to use reasonable care in inspecting the poles, and this notwithstanding the fact that the licensor was under a similar duty to its servants. *McGuire v. Bell Tel. Co. of Buffalo*, 60 N. E. 433 (N. Y., May, 1901); 167 N. Y. 208.

The Court held that the telephone poles were, as a matter of fact, and in spite of the peculiar circumstances of the case, a place of employment which the defendant was bound to use reasonable care to keep in a safe condition. *Pioneer Fireproof Const. Co. v. Howell*, 59 N. E. 537 (Ill., 1901). The reporters' head notes to this case, to the effect that the defendant was liable notwithstanding it had no right under its license to inspect the poles, are misleading. A minority of the Court, it is true, did

so interpret the license, but the majority expressly denied that the defendant lacked this right.

**TORTS—NEGLIGENCE—PASSENGER ELEVATORS.** The owner of a passenger elevator, operated for the convenience of his tenants, is not, as such, a common carrier within the meaning of Mass. Pub. St., c. 73, § 76. *Seaver v. Bradley*, 60 N. E. 795 (Mass., June, 1901). See 1 COLUMBIA LAW REVIEW, 398, 413.

**TORTS—PUBLIC CHARITY—HOSPITAL'S LIABILITY TO PATIENTS.** Plaintiff was injured by negligent nurse in defendant hospital, a public charitable institution. There was no negligence in selecting the nurse. *Held*, plaintiff could not recover. *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. Rep. 294 (C. C. A., First Circuit, May, 1901). See NOTES, p. 485.

**TORTS—STATUTES—DUTY TO FORWARD MISDELIVERED LETTERS.** A defendant who got from the post office a letter, seemingly addressed to him, but which in reality was intended for the plaintiff, and carelessly kept it for several days, thereby causing loss to the plaintiff, was *held* liable in damages. *Cohen v. Cohen*, 63 S. W. 544 (Tex., May, 1901).

The case was decided on two grounds: First, by analogy to the telegraph cases, and second, on the ground that the defendant, under Rev. Stat. U. S., § 3892, owed a duty to the plaintiff. The telegraph cases go on the ground that the company is under a liability similar to that of a common carrier, and hence is bound, by common law, to deliver the message. *Western Union Co. v. Hargrove*, 36 S. W. 1077 (Tex., 1896). There was no such duty here. Rev. Stat., § 3892, fixes a penalty where a man takes a letter, not belonging to him, with criminal intent, and does not cover the principal case. At most, defendant was under a moral obligation to return the letter, and there is no legal ground on which to hold him liable in damages.

**TRUSTS—NOTES INDORSED FOR COLLECTION—RIGHTS OF OWNER.** A check was sent to the defendant bank for collection, and paid by cancellation of debts existing between the defendant and the drawee. The defendant failed. *Held*, the owner was not a creditor but *cestui que trust*. *Kansas Bank v. State Bank*, 64 Pac. 635 (Kan., April, 1901).

As a general rule, upon the collection of the note, the bank becomes the debtor of the owner, being presumptively entitled to treat the proceeds as his own. *National Bank v. Hubbel*, 117 N. Y. 384 (1889); *Phoenix Bank v. Risly*, 111 U. S. 125 (1884); *Tinkham v. Heyworth*, 31 Ill. 519 (1863). But if there be specific instructions for remittance, the collector becomes a trustee. *People v. Bank of Danesville*, 39 Hun. 187 (N. Y., 1886); *Bank v. Weems*, 69 Texas 489 (1888). And even though the specific money cannot be pointed out, if the proceeds have come into the collector's hands so as to increase his assets, the old rule as to tracing trust property is so far relaxed as to permit a recovery. *People v. Danesville Bank*, *supra*; *People v. Rochester Bank*, 96 N. Y. 32 (1884). But a payment of the collector's debts is not such an increase of the collector's assets as to be within the rule. The proceeds must actually form a part of the property on which the trust is sought to be fastened. *Bank v. Weems*, *supra*. 2 Perry on Trusts, 5th edition, § 838. On this ground it would seem the principal case is wrong.

## BOOK REVIEWS.

**THE FOURTEENTH AMENDMENT.** By Henry Brannon, Judge of the Supreme Court of West Virginia. Cincinnati: W. H. Anderson & Co. 1901. pp. 562.

Until this year there has been no special treatise upon the Fourteenth Amendment, except the six interesting lectures of Mr. W. D. Guthrie, which, however, were prepared for class-room purposes and not as an exhaustive work. The profession have, therefore, hailed with pleasure the announcement of a complete treatise by a gentleman who has been for some twelve years past a Judge of the Supreme Court of the State of West Virginia, for a part of the time the President of that Court, and who in that capacity has taken part in decisions upon important questions arising under this amendment. It is, therefore, with great disappointment that we feel obliged to say that this book does not meet the needs of the profession.

The scope of the work as announced by the author is a very narrow one. Three of the five paragraphs of the amendment he does not attempt to discuss. The fifth paragraph, which confers upon Congress the power to enforce its provisions by appropriate legislation, requires but very brief treatment. Substantially the entire work is, therefore, confined to the first paragraph; that is, to the subjects of citizenship, of the privileges and immunities of citizens, of due process of law, and of the equal protection of the laws. The Fourteenth Amendment presents especial difficulties, both because the subjects with which it deals are inherently vague in outline, and because it was drawn apparently with the intention of leaving it so vague that its reach might thereafter be freely extended by process of "judicial inclusion." During the past thirty years, with continually accelerating rapidity, the Supreme Court of the United States has been developing its "general process of judicial inclusion and exclusion," and in the mass of prevailing and dissenting opinions there is much that the student and practitioner would be glad to have made clear by a thorough and methodical classification and analysis, showing what arguments have been overruled and what distinctions established, what past problems settled and what future problems brought to view.

In the present book there is nothing either thorough or methodical; scarcely anything that can be termed either analysis or classification. We may instance the now very important question of the constitutionality of legislation for the protection of laborers. Some courts have held that the Fourteenth Amendment annulled important legislation which for certain industries established the eight-hour day. These authorities are in conflict with, and therefore



overruled by the decision of the United States Supreme Court in *Holden v. Hardy*,<sup>1</sup> which sustained the Utah eight-hour constitutional provision, although confined in its operation to men employed in underground mining, smelting and similar industries. The author discusses the subject as follows: "*Hours of Labor in Mines*.—A statute limiting hours of labor in mines was held invalid, because not an act of police to protect the health of the public at large, but only miners? How do these cases harmonize with *Holden v. Hardy*? Such a law was held valid in another case." Only a reference to the foot-note would show that *Holden v. Hardy* emanated from the court which had the final power of declaring the meaning of the Fourteenth Amendment, while the decisions cited to the contrary were those of inferior tribunals. A few pages further on the author says: "*Eight-Hour Labor Law*.—A statute fixing a day's labor in underground mines or workings at eight hours, except in emergency, where life or property is in imminent danger, and imposing a penalty for violation of the law, was held a valid exercise of the police power not violative of the Fourteenth Amendment by denying equal protection of the law, or depriving of property without due process of law. Cases holding *contra*." Here again a reference to footnotes is necessary to ascertain which ruling is that of the court of last resort. Not even from the footnote can the reader ascertain the courts "holding *contra*." Two of the three cases are cited merely from the Pacific Reporter; nor does it appear whether they are earlier or later in date than *Holden v. Hardy*. The reader might infer that the author regarded three strong opinions from State courts as sufficient to override a United States Supreme Court decision upon the construction of the United States Constitution.

The arrangement of the book is as loose and perplexing. For instance, take the short chapter on Taxation. Among the sub-heads of this chapter are, "Condemnation of Property," "Lunacy Inquisition," "Vagrants," "Drunkards," "Jury to Fix Punishment," "Heating Cars by Stoves," "Petroleum Illumination," "Selling Meats in Certain Places," "Dogs," "Ordinance Against Moving Building on or Across a Street," "Driving Cattle Over Road Bank," and "Fishing Confined to State Citizens." On the other hand, many paragraphs upon important questions of taxation are to be found in the chapter entitled "Equal Protection of the Law;" not, however, grouped together, but interspersed with such headings as "Railroad Liability for Negligence," "Jury Challenges," "Innkeepers' Lien," and "Eight-Hour Law." Under the heading of "Independence of State Governments" we find the sub-heading "Waste of Natural Gas." The looseness which characterizes the arrangement of the book and its treatment of the various subjects characterizes also every detail of reference and of style. The citations of authorities are not given upon any sustained plan. Cases are often cited from the various weekly reporters or from the Lawyers' Reports Annotated, without any indication as to their date

<sup>1</sup> 169 U. S., 366.

or the court by which the decision was rendered. It would be impossible to obtain a clear understanding of the text without a continual reference to the notes. Instances like this are not uncommon: "If the Indian has objured fealty to his tribe or nation, amalgamated with the people generally by residing separate and apart from his tribe, and adopting civilized life, he is a citizen. Until this act he did not thus become a citizen." The "act" spoken of in the second sentence is a statute, identifiable by the foot-note to the first sentence.

One reason for the rambling character of the book soon discloses itself. The book was partly written before the authorities on the question had been digested or even examined by the author. It was not afterwards carefully rewritten and revised, but the newly discovered—although not always recent—authorities were inserted wherever it seemed convenient, as were the views of the author thereon. Sometimes it would almost seem that notes simply intended for his own guidance had somehow slipped into the book. For instance, after discussing the question whether a void contract of a municipal corporation can be thereafter validated by the Legislature, he says: "Can it so act on private corporations? I doubt. But if it can it would be on the theory that the corporation had received its franchise from the State. It cannot be done." Referring to a statute denying to colored citizens the right to sit on juries, he says: "The West Virginia statute was held void and the conviction was annulled by reason of the violation of the Fourteenth Amendment. Same as to grand juries. It quashes indictment." Sometimes a single paragraph discloses, without distinctly stating, a gradual change in the author's views of the correctness of some decision. Thus, he discusses in a long paragraph the case of *Tyler v. Judges of Registration*, cited by him from the *Northeastern Reporter*. He begins the paragraph with this sentence: "A late signal decision sustains, *probably exceeds*, the just power of the State to settle and quiet title to lands without regular suit on publication." He ends the paragraph with the following sentence: "The case goes quite far, but *I suppose it is tenable* under principles above stated." In this method the nearly five hundred pages of this book have been expanded, although the first chapter said: "It is the author's design not to make the volume large; but as many of the authorities to be referred to are not accessible in many places, he will feel justified in making copious extracts from decisions, which may enlarge the volume beyond his present expectations."

The author's method of preparing the book by elaborating the ideas in his own mind first and then writing them out before examining the authorities, is illustrated by his discussion of the principle that persons born in the United States are citizens thereof. He says: "If the common law would not do this, then the general law of nations would do so. I later meet a case, so settling the matter" (the case cited being *United States v. Wong Kim Ark*,<sup>2</sup> decided in

<sup>1</sup> 175 Mass., 71.

<sup>2</sup> 169 U. S., 696.

March, 1898). After discussing the question of the right of the United States to acquire foreign territory, he discovers the leading case on that subject, and says: "After writing the above, I observe that the illustrious Chief Justice Marshall, who stands without a peer in American jurisprudence, and whose judgment very few would assume to controvert, declared in *The Insurance Company v. Canter*, that," etc. He states, without doubting, that "children of Filipinos born since the acquisition of the Islands by the United States would be citizens," evidently ignorant that that question had already been discussed in the Supreme Court in cases, the subsequent opinions in which indicate that that court will in all probability reach the contrary conclusion.

As we are thus compelled to the opinion that the book is not prepared with sufficient care to render it of value, it is unnecessary to discuss its many peculiarities in matters of substance, such as its confusion between residence and domicile in connection with citizenship, its failure to keep in mind the distinction between the limitations of the Fourteenth Amendment and those of the commerce clause of the Constitution upon State legislation, and its extension of the definition of the police power so as to include herein the power of the States to regulate the tenure of real property.

We are glad to say, in concluding, however, that the book contains a great deal of eloquent language, which will cheer, if it sometimes fail to enlighten, the reader.

**ATLAS AND EPITOME OF DISEASES CAUSED BY ACCIDENTS.** By Dr. Ed. Golebiewski, of Berlin. Authorized translation from the German, with editorial notes and additions by Pearce Bailey, M. D., consulting neurologist to St. Luke's Hospital [etc.]. Forty colored plates and 143 illustrations in black. Philadelphia: W. B. Saunders & Company. 1900. pp. 549.

For the subjects within its scope, this is an exceedingly convenient hand-book of reference for the lawyer. It is the first systematic treatise of its kind; is written by a competent authority; is well translated and is well edited for the use of American readers.

As the preface says, the book "presents a systematic description of the sequels of injuries caused by accidents." This is exactly what the lawyer wants, for legal questions arising out of physical injuries have to do, of course, with the results of such injuries—impairment of health, deformity or disability, as the case may be.

The work is divided into two parts. The first, covering fifty pages, treats of general considerations. These are the causes, statistics and mortality of accidents; the general characteristics of injuries and traumatic diseases of the several structures of the body—skin, nerves, bones, joints, etc.; the influence of injuries on the development of tumors, and their connection with poisonings, alcoholism, and certain infectious diseases (malignant pustule, wool-sorters' disease, lockjaw and tuberculosis).

Part II constitutes the main body of the book, and treats in succinct detail of injuries and traumatic diseases of the parts to be

found in the several great divisions of the body—head, trunk, chest, abdomen, upper and lower extremity, respectively. In the case of each special region there is given first an excellent and most serviceable résumé of the anatomy and physiology of the part, by means of which even the non-medical reader can easily understand the pathological points that follow. Then comes an account of the various injuries and resulting diseases and deformities affecting the region. In these accounts brief notice only is given to the symptomatology and surgery of the original injury, since such matters do not come within the scope of the book. The subject discussed is the matter of the sequels of the injury—the nature of such sequels, their recognition, their probable duration and possible change of character, their effect on life, health and physical ability, their proper treatment (when this is of importance), and, if disabling, the proper indemnity from the insurance point of view. Illustrative cases are cited and in connection with these are given numerous and excellent illustrations, both in black and in color. Among the illustrations of the former class are many reproductions of X-ray photographs, representing chiefly the results of fractures and dislocations of bones of the extremities. The illustrations in color consist of forty beautiful lithographic plates after original water-color drawings.

The book covers the field within its scope, with the exception, as acknowledged, of injuries of certain special organs. The treatment is concise, as is to be expected in a handbook, but the style is clear and the subject-matter is well arranged for easy reference. The book is beautifully printed on good paper.

**AN EPITOME OF PERSONAL PROPERTY LAW.** By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell, Limited. 1901. pp. xv, 144.

This is the second volume of a series of epitomes by Mr. Kelke, and is described by the author as supplementary to the first volume of the series, *An Epitome of Real Property Law*. In the preface he calls attention also to the facts, (1) that personal property has become closely entangled with the law of contract, (2) that he attempts to avoid the discussion of questions of contract and to confine himself to the property side of his subject. That he has succeeded in this attempt is apparent from the headings of the nine chapters into which this little handbook is divided. They are as follows: Absolute Property; Qualified Property; Shipping Property; Choses in Action—Negotiability; Annuities—Insurance—Debentures; Partnership and Company Shares; Patent—Copyright—Trademark—Goodwill—Options; Involuntary Alienation; Administration.

While the author has been successful in “keeping off contract,” and in confining himself to the nature, the acquisition and the transfer of personal property, it is not quite clear to us why the work should have been undertaken. Certainly there is no demand for such a book in this country. It is too abstruse and too much

epitomized for an elementary treatise, and its citations of authorities are too meager to make it valuable to the practicing lawyer. There is no place for it in the law school curriculum; nor do we think that young men would find it suited to their needs in cramming for bar examinations. If it supplies a want in England, it bears witness to methods of legal training there which are quite different from those which are approved here.

COMMENTARIES ON THE LAW OF NEGLIGENCE. By Seymour D. Thompson, LL. D. Indianapolis: The Bowen-Merrill Co. 1901. Vol. I, lvii, 1254.

This is the first volume of a stupendous work, a work in striking contrast with the *Epitome of Personal Property* noticed above. That is concise to a fault; this is prolix in the extreme. That is kept within narrow limits by its author's adherence to his resolution to stick closely to his subject and to disentangle it from allied topics; this has been expanded from the three volumes originally intended, to six, in order to avoid "throwing away large portions of the material which had been collected," as we are told in the preface. The *Epitome* reads like jottings for lectures; the *Commentaries* like the diffuse judicial opinion which has come into vogue with the stenographer and typewriter. Indeed, Judge Thompson tells us again, in his preface, that he "is now convinced that the treatise form, so-called, is the best form in which to present legal doctrines and their applications—the same being substantially the form and style employed by a judge in writing an opinion."

That the work, when completed, will be a mine of valuable material, is beyond doubt. Not only the contents of this volume, but the learning and industry of its distinguished author, give full assurance of that. Perhaps, the term "mine" is not a happy one; certainly, we do not wish to give the idea that the material in this volume is a conglomerate mass. It is far from that. It has been carefully analyzed, arranged and labeled. There is no confusion of thought and no jumbling of topics. All that can be said in the way of criticism is, that the book contains a great deal of valuable matter never before collected under the head of Negligence. The chapter on Dogs furnishes a fair illustration. Two of the sections are devoted to "The Status of Dogs as Property," and to the "Liability of Corporations Keeping Dogs." In neither of these sections is the subject of negligence referred to.

The present volume contains a general discussion of the principles of the law of Negligence. The second volume will be devoted to the negligence of telegraph companies and of railway companies, except as carriers of passengers. Volume three will deal with the negligence of carriers of passengers by land and by water, with the negligence of municipal corporations and of public officers. Negligence in the relation of master and servant will be the topic of volume four, while the fifth volume will deal with the negligence of carriers of goods, and with remedies, procedure and damages. The sixth volume will embrace topics not included in the predecessors, as well as an exhaustive index and a table of the thirty-five thousand

cases, which, it is supposed, will be cited in the entire work. We shall await the forthcoming volumes of this series with much interest.

AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION. By John S. Ewart. Chicago: Callaghan & Company. 1900. Pp. xli., 548.

This is an original and suggestive book. It displays a careful study of leading cases, an unusual ability to analyze decisions, to criticize authorities and to announce broad generalizations. That the author's conclusions are as trustworthy as they are daring is open to question. His own confidence, however, in their absolute accuracy is unbounded, reminding one not a little of Sidney Smith's remark, that he wished he was as sure of anything as Tom Macaulay was of everything.

The readers of this book will agree with Mr. Ewart, that the law of estoppel, as set forth by him, is very modern; so modern, in fact, as to raise serious doubts whether it yet exists. Certainly no one can peruse this work without being convinced that neither any judge nor any other writer has discovered the true principles of estoppel, if Mr. Ewart has set them forth here. Every statement of those principles by his predecessors has been woefully inadequate or positively erroneous. And yet, the learned author is able to quote sentences or paragraphs from their writings in support of almost every proposition which he lays down. Indeed, the deftness with which he weaves these quotations into the fabric of his argument is one of the striking characteristics of the book. The force and smoothness of that argument, we have to confess, swept us with it for some time. Perhaps the first thing to give us pause was the author's attempt to show that every peculiarity of negotiable instruments usually ascribed to the law merchant is really an example of estoppel. He admits that the authorities are against his views. He does not hesitate to quote Lord Mansfield, Barons Pollock and Wilde, Justices Williams and Byles, Lord Herschell, Mr. Bigelow and Sir Frederick Pollock, with a view to writing them all down opposed to him, and egregiously mistaken. In his opinion, there is no "law of merchants, in any other sense than there is a law of financiers or a law of tailors." There is no antagonism between the principles of the law merchant and the common law, nor do the doctrines of the former constitute exceptions to those of the latter. What Lord Mansfield, Chief Justice Cockburn, Lord Blackburn and their associates on the bench and at the bar have designated as the law merchant is not a well-defined body of legal rules at all; it is but a misleading figure of speech for which the one word "estoppel" should be substituted.

This being granted, it follows that every such statement as this: "The law merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority," is erroneous, and that every decision based upon the doctrine that negotiable instruments are governed by different rules from those applicable to non-negotiable writings

is unsound. *Young v. Grote*,<sup>1</sup> "that fount of bad argument," as Lord Esher styled it, is repeatedly cited and approved by Mr. Ewart, while the latest decision of the House of Lords, dealing with estoppel by negligence,<sup>2</sup> is criticised without mercy. It is not strange that the author disapproves of this decision, although the distinguished judges who rendered it were unanimous in their conclusions and entirely in accord in their reasoning. He is bound to consider it erroneous or to modify one of his leading propositions, which he states in the following form: "The person putting in circulation a bill of exchange owes a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations of it." In the case just referred to, the House of Lords declared that such was not and ought not to be the law; that judicial authority and business usage were opposed to the imposition of any such duty, and held that one who accepted a bill for £500, with spaces in the body which made it possible for the drawer thereafter to raise the bill to £3,500, was not liable on the bill as so raised; that it was not a case of estoppel by carelessness. Said Lord Shand: "I agree with your Lordships in holding that there is no sound reason or legal principle to support the view that, on the ground of negligence, an acceptor of a bill becomes liable to a subsequent holder for a sum beyond the amount of his acceptance because the form of the document and the stamp used admit of a forgery in the hands of a dishonest person, such as occurred in this case."

Another proposition for which the learned author contends is stated as follows: "If an owner of shares will execute blank transfers of them prior to their being required, and allow them to escape, he, and not an innocent purchaser of them, ought to loose." This he declares to be the New York law, as shown by *McNiell v. Tenth National Bank*.<sup>3</sup> But he seems to be unaware of the later decision of the same court, in *Knox v. Eden Musee Co.*,<sup>4</sup> which is inconsistent with his proposition, and which explains the *McNeil* case as holding "that an agent to whom the owner has delivered a certificate of stock, duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a *bona fide* transferee who has no notice of the limitations of the agent's authority." Certainly if the proposition laid down by Mr. Ewart is law, the New York Court of Appeals did not know it in 1896, nor was it known to the Supreme Judicial Court of Massachusetts in 1899, as shown by *Scollans v. Rollins*.<sup>5</sup>

Notwithstanding our belief that the author's views are frequently unsound, and that the book cannot be accepted as a safe exposition of the principles of estoppel, we are convinced that it is

<sup>1</sup> 4 Bing., 253.

<sup>2</sup> 1 Schofield v. Earl of Lonsborough, (1896) A. C., 514.

<sup>3</sup> 46 N. Y., 325.

<sup>4</sup> 148 N. Y., 441.

<sup>5</sup> 173 Mass., 275.

worthy of the most respectful treatment; that every lawyer will profit by a careful reading of it; that it is a valuable contribution to legal learning.

Reviews to follow :

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell, of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

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**THE LAW OF SALES OF PERSONAL PROPERTY.** By Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law. Second Edition. Revised and enlarged. Boston: Little, Brown & Co. 1901. pp. viii, 299.

**THE LAW OF AGENCY.** Including the Law of Principal and Agent and the Law of Master and Servant. By Ernest W. Huffcutt, Professor of Law in the Cornell University College of Law. Second Edition. Revised and enlarged. Boston: Little, Brown & Co. 1901. pp. li, 406.

**LAW OF REAL PROPERTY.** By Charles T. Boone. Second Edition. San Francisco: Bancroft Whitney Co. 1901. 3 vols. pp. xxvii, 612, 631; xiii, 651.

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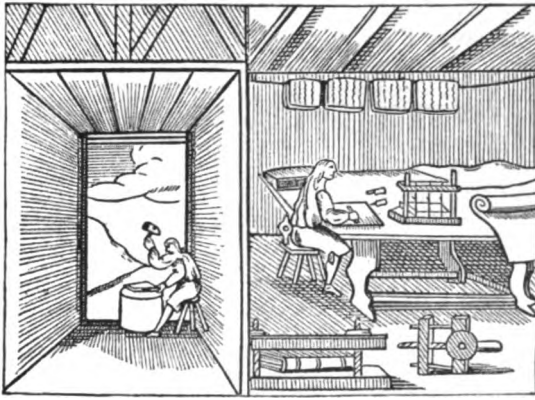
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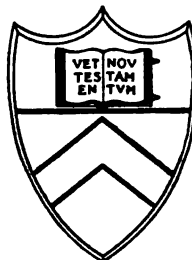
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NICHOLAS MURRAY BUTLER, LL.D.,  
*Acting President.*

# COLUMBIA LAW REVIEW.

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## PROPERTY RIGHTS IN PERCOLATING WATERS.

IT is assumed to be a firmly settled rule of law that the right of enjoyment of a running stream of water exists *ex jura natura*, and belongs to the proprietor of adjoining lands as a natural right incident to the ownership of the soil. Such proprietor is entitled to its use and enjoyment in like manner as he is entitled to other natural advantages of his estate. He is entitled to have the stream come to him in its natural state, in flow, quantity and quality, and it must go from his land in like manner, unobstructed in its passage. As such streams of water are for the benefit and comfort of the proprietor, he has the right to make such reasonable use of flowing water as is found consistent with the same rights which attach to every riparian owner both above and below his estate. He may divert it for purposes of use in manufacturing, but he cannot unreasonably detain it, and he must return it to its ordinary channel in a usual manner when it leaves his estate. He may permanently abstract such portion of the water as is necessary for domestic, agricultural and other uses, subject to the limitation that such abstraction shall not materially diminish the flow of the water in its usual volume, and is not inconsistent with the same right of reasonable use by the other proprietors upon the stream.<sup>1</sup> The rights and liabilities of the riparian owners in the extent and manner of use must, therefore,

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<sup>1</sup> 3 Kent's Comm. 439; *Barkley v. Wilcox*, 86 N. Y. 140.

necessarily depend upon the facts and circumstances of the particular case. Subject to this limited right of use, no person can take the waters from a running stream, divert its flow, or change the course of the natural channel, without liability therefor to the riparian owner who suffers damage by the act.<sup>1</sup> It is of no consequence by what means the act of abstraction or diversion is accomplished, if in fact the water is withdrawn or diverted from its usual channel.<sup>2</sup>

There is little difficulty, either in definition of rights or in application of remedy for a violation of those rights in the case of water flowing in a defined channel. While the proprietor of the land has the right of use of the water, he has no ownership therein; his only right and interest is, to use and enjoy. It is a usufructuary right solely. The right to use, however, is not diminished by this limitation of property right. Neither is the right of use variable; it remains constant and continuing. For this reason, the right is not limited to the particles of water actually in the stream; it is a continuous right, which is only fully satisfied when the stream flows without sensible diminution. As we shall presently see, this statement involves the doctrine and rights of owners of percolating waters.

What constitutes waters of a running stream—which are protected by the rule we have stated—is a question not yet clearly settled or precisely defined. Lord Tenterden defined a running stream to be “water flowing in a channel between banks more or less defined.”<sup>3</sup> Mr. Angell says, “A water course consists of bed, banks and water; yet the water need not flow continually; and there are many water courses which are sometimes dry.”<sup>4</sup> “A natural water course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water course that the flow should be uniform or uninterrupted. The other

<sup>1</sup> *Village of Delhi v. Youmans*, 45 N. Y. 362; *Pixly v. Clark*, 35 N. Y. 520.

<sup>2</sup> *Van Wicklen v. City of Brooklyn*, 118 N. Y. 424; *Ætna Mills v. Brookline*, 127 Mass. 69; *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478; *Grand Junction Canal Co. v. Shugar*, 6 Ch. App. 483.

<sup>3</sup> *Rex v. Oxfordshire*, 1 B. & A. 301.

<sup>4</sup> *Angell on Watercourses*, § 4.



elements existing, a stream does not lose the character of a natural water course because in times of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water."<sup>1</sup> This definition received approval in *Bloodgood v. Ayers*.<sup>2</sup>

It is noticeable that none of these definitions embrace in terms the source of supply as a part of the stream. A spring breaks to the surface by force of some power operating below the ground, and from it flows a perennial stream. The spring, however, does not fall within the express terms which the authorities have used in definitions of a running stream, the waters of which may not be abstracted or diverted. Andrews, Ch. J., in *Barkley v. Wilcox*,<sup>3</sup> refers to a stream as one "having permanent sources of supply;" yet clearly his definition did not embrace the source as a part of the stream. In *Village of Delhi v. Youmans*,<sup>4</sup> however, the court assumed that a spring was a part of the running stream. Peckham, J., said: "If the action of the defendant took the water away from the spring, after it had reached there, after it had become a part of an open running stream," then an action would lie.

It is here that we arrive at a difficulty which is necessarily inherent in the character of the respective rights and liabilities of adjoining land owners in relation to percolating waters and those of riparian owners in running streams. It is evident that at this point the right of the riparian owner begins to fade until it disappears in the right of the land owner upon whose land is the source of supply. The question of where the riparian owner's right ends and the right of the adjoining land owner begins, has furnished the occasion for a display of learning, ingenuity and reasoning power rarely equaled in forensic debate or expressed in judicial decision. Research has seemingly exhausted all the sources of knowledge of the subject, while ingenuity in statement and power of reason have attained their highest expression. The difficulty is inherent in the problem and arises out of the necessity of giving to each person just recognition in the exercise of legal rights.

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<sup>1</sup> *Barkley v. Wilcox*, 86 N. Y. 143.

<sup>2</sup> 108 N. Y. 400.

<sup>3</sup> *Supra*.

<sup>4</sup> 45 N. Y. 363.

It is plain beyond controversy that the riparian owner has the legal right to a continuous flow of water in a running stream; and it is settled beyond debate that the owner of the land has a property right in the water percolating below its surface and, subject to some exceptions to be noticed hereafter, may appropriate it to such use as he chooses without liability to any other person.<sup>1</sup> It is evident, therefore, that where a running stream is supplied by a spring issuing from the earth, whose source is percolating water flowing in no defined or known subterranean channel, the right of the riparian owner, if upheld, requires that the right of the adjoining land owner to intercept the percolating water, by cutting off the source of the stream, be denied or limited. Under such circumstances, whose right must yield? Whose legal right shall be denied? And if neither right shall be upheld as absolute and unqualified, what rule shall obtain? That these are troublesome questions was at once recognized when they first arose. That the "waters" are yet troubled is evident from the very last expression of the judicial mind upon the subject. In fact, so troubled and muddy are the judicial waters at times that the rights of the parties are not yet sufficiently clarified to be easily seen. Upon this branch of our subject, it seems necessary to call attention to some of the leading judgments that have been pronounced.

*Chasemore v. Richards*<sup>1</sup> presented a case of the plaintiff as owner of a mill upon a running stream, the waters of which he had enjoyed for upwards of sixty years as a motive power for his mill. The defendant sunk a well near the river, which intercepted the water percolating through the strata into the river, and also cut off the source of the springs which rose to the surface, from some of which flowed small surface streams to the river, and from others, water percolating underground, reaching the same goal. The water thus diverted sensibly diminished the flow in the stream, and damaged the plaintiff. He had a verdict at the trial, which upon appeal was reversed. In the elaborate discussion which was had, it was assumed that the case presented alone a question of the diversion of percolating waters flowing in no known or defined channel, although

<sup>1</sup> 7 H. L. Cas. 349.

in the statement of fact there appeared, in part, to be well-defined streams from some of the springs which entered the river upon the surface of the ground. This case clearly enunciates that there is no right of use by the riparian owner of water entering a running stream by percolation; and that an adjoining owner through whose land the water percolates may cut it off with impunity, even though it sensibly diminishes the flow of water in the stream and inflicts serious damage upon the riparian proprietors. The basis upon which the rule rests the court found in the fact that the proprietor of the land owned the percolating water therein as a part of the soil, and that he possessed the clear legal right to make use of the same in any manner that he chose, even though it cut off the supply of water to running streams, or diverted water which otherwise would flow upon adjoining lands.

The doctrine laid down by Pollock, C. B., in *Dickinson v. Canal Co.*,<sup>1</sup> that to divert water from a running stream is unlawful, whether the water was abstracted before or after it reached the channel, was repudiated, and the rule in *Acton v. Blundell*<sup>2</sup> was accepted as decisive in principle of the question presented. The latter is a leading case and announces a rule of law which has been uniformly accepted by the courts of England and of this country, save alone, I think, in the decisions of the Supreme Court of New Hampshire.<sup>3</sup>

The decision in *Acton v. Blundell*, however, did not necessarily determine the question presented in *Chasemore v. Richards*. The only question arising in the former related to the right of an owner of land to intercept percolating water when engaged in making legal use of his land. In opening a mine he cut off the source of supply of his neighbor's well; and it was held that for such act no liability attached. This holding was rested upon the ground that as the flow of water in underground channels was obscure, uncertain and unknown, and as their existence, origin, course and movement were concealed, any attempt to make administration of respective rights by legal rules

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<sup>1</sup> 7 Exch. 280.

<sup>2</sup> 12 M. & W. 352.

<sup>3</sup> See *Barrett v. Company*, 43 N. H. 569; *Swett v. Critts*, 50 N. H. 439.

would be attended by hopeless confusion and would naturally result in working more of injustice than justice. This and modern cases have also asserted that the recognition of correlative rights was opposed to a sound public policy, as it would work mischievous results in curtailing the improvement of land, and would burden its use with liabilities which would render the exercise of such legal right extremely hazardous.

The Acton case involved no question of rights in running streams, nor in sources of supply thereto; and while undoubtedly its principles have general application in consideration of the question presented in the Chasemore case, yet, with deference to the learned Court who decided that case, they do not seem to be controlling of the question involved therein. We are not, therefore, surprised to find that when the right was asserted to intercept the waters of a spring, the source of supply of a running stream, in *Grand Junction Canal Company v. Shugar*,<sup>1</sup> Lord Hatherly denied the existence of such a right, saying that in respect thereto, with the Chasemore case before him: "If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all." The suit in that case was for an injunction restraining the defendant from diverting the water of certain springs running into a pond, by means of a drain excavated upon the defendant's land. It is quite evident that the act which cut off the springs was by intercepting the flow below the surface of the ground and before the waters had reached the channel of the running stream. Yet the act of interception necessarily caused some of the particles of water that had reached the stream to recede, and thus be lost to the riparian owner. And for this reason, and upon this narrow ground, the case is distinguishable from the Chasemore case, so far as effect is given to the legal reasons assigned for the judgment in the latter case.

We are not ambitious, however, to attempt a reconciliation of these two cases—either of the judgments which were reached or in the reasons upon which they proceeded. The judgment in the *Grand Junction Canal Co.* case and the rea-

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<sup>1</sup>6 Ch. App. 483.

sons given closely resemble the judgment pronounced by Portia and the reasons assigned therefor:

“ This bond doth give thee here no jot of blood;  
The words expressly are, a pound of flesh :  
Then take thy bond, take thou thy pound of flesh;  
But, in the cutting of it, if thou dost shed  
One drop of Christian blood, thy lands and goods  
Are, by the laws of Venice, confiscate  
Unto the state of Venice.”

Lord Hatherly may not have used the same elegance of expression, but he was quite as vigorous in asserting that if, in the exercise of the legal right to take the spring, one drop of water was taken from the running stream, such act was “ confiscate ” of the legal right.

It seems to be evident, therefore, that the adjudicated cases in England do not settle with clearness the respective rights of riparian owners in and to percolating water which is a source of supply to a running stream. The Chasemore case seems to have denied any right of saving to the riparian owner small streams whose source of supply is springs, even though they run in well-defined channels upon the surface of the ground from the spring to the large stream. As to the subterranean streams which feed the river, the right is clearly denied, and the legal right of the owner of the land in the percolating water is upheld. In the Grand Junction Canal Company case it is equally clear that the owner of the land upon which issues a spring, the source of supply of a running stream, has no right to intercept the source of supply of the spring. With the latter limitation, it may, we think, be safely said that the law of England protects the owner of land in the enjoyment of percolating water to the fullest extent, in practical measure the same as in the enjoyment of his land.

The Grand Junction Canal Company case, so far as it maintains the right of the riparian owner in and to the source of supply to the running stream which the spring furnishes, is in harmony with the views expressed in *Village of Delhi v. Youmans*.<sup>1</sup> Therein it was assumed that the spring, under the circumstances to which we have adverted,

<sup>1</sup> 45 N. Y. 362.

was to be regarded as a part of the stream. Such we conceive now to be the settled American rule of law. At least, it is so settled in the State of New York.

In *Arnold v. Foot*,<sup>1</sup> the defendant was the owner of land upon which issued a spring, from which flowed a stream through the defendant's land to and upon the plaintiff's premises. The defendant diverted the stream, so that it flowed entirely upon his land. Savage, Ch. J., in delivering judgment, said: "In the case now before the court, the water from the spring in question was wont to run, *currere solebat*, in a direct line, into the plaintiff's premises. This was the direction given to it by Providence; it was intended to water the land immediately below the spring; and it must continue to water that land, no matter who may be the owner. The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel."

It would be a right of little value to the riparian owner, if the owner of the land upon which the spring was situated could intercept the water before it reached the spring which supplies the channel. To support such right, and yet deny the right to divert the stream, leads, it seems to us, to a practical inconsistency. And yet it is said in *Village of Delhi v. Youmans*: "But if it [the act] merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon defendant's own land, for the use of his family and stock, this action will not lie." And with more of assertion than of reason, as it seems to us, the learned Judge adds: "The law is settled in that way, both here and in England."

The question again arose in *Bloodgood v. Ayers*.<sup>2</sup> That was a suit in equity to restrain the defendants from continuing to divert the waters of what was claimed to be a running stream. Upon the defendant's land arose a living spring, the overflow from which, however, ran in no defined channel over the plaintiff's land; that some portion of the

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<sup>1</sup> 12 Wend. 330.

<sup>2</sup> 37 Hun, 356.

water from the spring flowed over the sod upon plaintiff's premises was apparent; that it then disappeared in the ground and again came to the surface where the plaintiff had established his reservoir was quite probable; but such conclusion was only established by inference or reasoning. The Supreme Court held that it did not clearly appear that the water which flowed upon the plaintiff's premises came from the overflow of the spring; or, if it did, that did not constitute the same a water course, within the definition laid down in *Barkley v. Wilcox*.<sup>1</sup> This case recognizes the rule that there may be lawful diversion of percolating water before it reaches a spring which is the source of supply of a running stream. Upon appeal to the Court of Appeals, the judgment was affirmed,<sup>2</sup> the Court holding that such a spring belongs exclusively to the owner of the land, and is of the same character of property as is the earth or minerals beneath the surface of the land. In *Macomber v. Godfrey*,<sup>3</sup> it was held that a stream with defined banks did not cease to be such where it spread out over the surface of the land in no confined channel, but continued to flow until it again reached a defined bed.

These cases serve to show that the tendency of the courts has been to protect the right of the riparian owner in the source of supply of the running stream, and to deny a right in the owner of the land to intercept such flow, even though it be done by intercepting the percolating water which supplies the source of the running stream. But it is noticeable that in the discussions which deny this right of interception, it is always assumed or asserted that the act which intercepts the supply takes from the water already in the spring or stream. The qualification is usually made that, if the act does not accomplish this result, it is the exercise of a legal right, and protected as such. Under this rule, it is evident that the right of each party is extremely dubious. We shall hereafter suggest a rule, not new perhaps, but which, in view of modern conditions, may at least be practically applied and save the substantial

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<sup>1</sup> 86 N. Y. 143.

<sup>2</sup> 108 N. Y. 400.

<sup>3</sup> 108 Mass. 219.

rights of each party. Some authority and much reason exist therefor.

In the past four years, the Supreme Court and the Court of Appeals in the State of New York have had occasion to consider and decide a new phase of the question of property rights in percolating water. First, as connected with the interception of such water as a source of supply to a spring, the source of a running stream and pond; second, the right of adjoining owners of land in extracting percolating water in the soil, not for use upon the land of either party, but with the purpose to gather such waters for transportation and sale to non-resident persons; third, the right of a municipal corporation to sink driven wells, and by means of powerful pumps draw to its station the sub-surface water percolating in the soil over an area of from five to eleven square miles, and the liability incurred thereby to adjoining owners. The City of Brooklyn, for the purpose of obtaining a water supply for its inhabitants, acquired title to certain lands in the County of Queens and constructed thereon a reservoir, aqueducts and culverts or conduits for holding and carrying water. In connection with this construction, it sunk wells and connected them with powerful steam pumps, by means of which in 1895 it extracted 36,421,147 United States gallons of water daily. The amount withdrawn increased thereafter until it reached about 42,421,147 gallons daily. The effect of this operation was to lower the hydraulic grade or spring line over a considerable extent of country, resulting in the destruction of a brook and pond owned by the plaintiff, and also of a large number of wells throughout the same locality. Action was brought against the city by the owner of the brook and pond to recover damages for their destruction. The Supreme Court, in a somewhat elaborate discussion, held that the defendant was liable for sucking away the source of supply of the spring, brook and pond.<sup>1</sup>

This decision was rested upon two grounds: First, that the doctrine which obtains between adjoining land owners, exempting them from liability for the interception of percolating water when engaged in making use of the land either for business or domestic purposes, agriculture or mining, or

<sup>1</sup>Smith v. City of Brooklyn, 18 App. Div. 340.



otherwise improving it, had no application; that the rule laid down in *Acton v. Blundell* and other cases of similar import was distinguishable, for the reason that such rule was limited in its application to the use of the land as such for some one of the recognized purposes to which the same could be devoted, for the pleasure, business or profit of the owner; that the use of the land for the sole purpose of drawing out the sub-surface water from the land of adjoining owners, storing and transporting the same for the use of the inhabitants of the city, who had no interest whatever in the land, was not the exercise of a legal right possessed by the city. Second, that as applied to a running stream and the right of the riparian owner as to it and its sources of supply, the maxim, *Sic utere tuo ut alienum non laedas*, applies, the rights and liabilities being dependent upon the particular facts of the particular case as applied to the doctrine of reasonable use and relative rights. As the complaint was dismissed at the trial, the judgment was reversed.

After a new trial, in which the plaintiff had a verdict the case was considered by the Court of Appeals<sup>1</sup>. It supported the recovery, but limited the ground upon which it based its judgment to the single question of right to divert the waters of a running stream, saying: "It is settled by the decisions of the courts of this State, and it is the rule in England, that no one may divert, or obstruct, the natural flow of a stream for his own benefit, to the injury of another. \* \* \* All the cases hold that the water of a natural surface stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way, is an interference with a natural right which will give rise to an action for an injury sustained. That the diversion and diminution of the stream were caused by arresting and collecting the underground waters which, percolating through the earth, fed the stream, does not affect the question." When this fact appeared, and that the defendant was the actor causing the injury, liability attached. The court refused to consider the rights in percolating water not connected with the supply of a surface stream, as not presented by the case under consideration.

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<sup>1</sup> *Smith v. City of Brooklyn*, 32 App. Div. 257; 160 N. Y. 357.

Taking the doctrine of this case literally as expressed in the language of the opinions deciding it, it settles beyond cavil the question that no one, for any purpose, can intercept the underground source of supply of a running stream so as sensibly to diminish its flow, without liability to the riparian owner suffering damage. The rule announced by Lord Hatherly in *Grand Junction Canal Co. v. Shugar*,<sup>1</sup> and the interpretation which we have placed upon it in this article, is expressly confirmed. It is to be borne in mind, however, that the facts of the case out of which arose this expression of doctrine were novel, having never arisen or been judicially considered before. The case was radically different from the improvement of land by an adjoining land owner. In consideration of the latter question, it has been asserted in terms quite as strong as the last utterance, and by the Court of Appeals, that if, in digging a well upon his own land, the owner intercept the underground current supplying a spring, the source of a running stream, no liability attaches.<sup>2</sup> These two pronouncements seem to us to be in conflict. There are two things, however, clearly common to both cases. Each cites; in the main, the same authorities to support its doctrine, and each asserts that its rule of law is well settled in the courts of this State and in England.

In view of these judicial utterances, it is difficult to determine with certainty what the rule is which will finally be applied to all cases of the interception of percolating waters that supply running streams. If the interception be by the exercise of a legal right in the improvement of land by the owner or possessor, the mere interception of the unknown current of water, even though it interfere with a running stream, does not create liability as matter of strict law unless it takes from the particles of water in the stream. To hold that it does overrules the doctrine of *Acton v. Blundell* and the long line of cases which have followed and sustained it.<sup>3</sup> The application of such rule entails many of the burdens and hazards which the courts have said ought not to attach as a penalty to the improve-

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<sup>1</sup> *Supra*.

<sup>2</sup> *Village of Delhi v. Youmans*, 45 N. Y. 362.

<sup>3</sup> *Bloodgood v. Ayers*, 108 N. Y. 400.

ment of land. The special features of the Smith case can easily distinguish it and its doctrine from application to the improvement of land by an owner. Such rule, to the extent to which it was carried, was not essential to the decision, and the court pronouncing it has the reserved right to disregard it.<sup>1</sup>

As to sources of the percolating supply of running streams, there is much authority for holding that the correct rule is that laid down by the Supreme Court; and that in the improvement of land by an owner, the doctrine of reasonable use and relative right more nearly answers to the respective rights of each party and clearly protects property and other rights of each.<sup>2</sup> What is a reasonable use under such circumstances becomes a question of fact for determination by a court or jury.<sup>3</sup>

In orderly arrangement, we come now to examine the question of rights in percolating water disconnected from a source of supply to a running stream. As between adjoining land owners, there is now no question that the property right is complete in the owner of the soil, and he may do with it as he pleases. If it flows from his land to that of his neighbor, the latter acquires no right therein as against the owner of the land, who may at any time cut it off or divert it, as he chooses, even though in the exercise of such right his neighbor is damaged by being deprived of its use. No rights therein can be derived from adverse uses or prescription, so long as the flow is concealed and unknown; and in intercepting its flow, as it is the exercise of a legal right, the question of motive is unimportant.<sup>4</sup> This rule, however, ceases to operate when the owner or purchaser of land uses the same solely for the purpose of drawing thereto all or such portion of the sub-surface water as is contained in adjoining lands, as the necessity or desire of such owner may require.

In *Forbell v. City of New York*,<sup>5</sup> the question as to the right to divert or intercept the flow of percolating water

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<sup>1</sup> *Colonial City T. Co. v. Kingston R. R. Co.*, 154 N. Y. 493.

<sup>2</sup> *Smith v. City of Brooklyn*, *supra*.

<sup>3</sup> *Colrick v. Swinburn*, 105 N. Y. 503.

<sup>4</sup> *Phelps v. Nowlin*, 72 N. Y. 39.

<sup>5</sup> 47 App. Div. 371.

and draw it to one spot, was considered. The purpose for which the water was taken and the circumstances were precisely the same as in the case of *Smith v. City of Brooklyn*,<sup>1</sup> except that there arose no question of rights in running streams; the diversion or interception was of percolating water solely. The plaintiff was the owner of land upon which he cultivated celery and other vegetables needing a wet soil for their proper production. The action of the defendant's pumps drew away the subsurface water, destroying the land either wholly or partially for such purpose of use. The Supreme Court held that such accumulation of sub-surface water was not the exercise of a legal right in the use of the land as against the adjoining owners, and that liability attached; that the reasoning which upholds property rights in percolating water wholly fails as applied to such a situation; that it is of no consequence that the flow of the subterranean stream was concealed and unknown; what was known was the fact that when the pumps were applied to the wells, their operation would draw substantially all the subsurface water to a given spot, and despoil the owner of the adjoining land of its beneficial use and enjoyment; that carried to its logical result, it would authorize the destruction of the adjoining land for purposes of agriculture, practically converting it into a desert, and this without the slightest pretence of the defendant's improving its own land. It is manifest that under such conditions, the reasoning of the cases which support the right to intercept percolating water and prevent it from finding its way upon or from the land, can have no application. Neither was there present any pretence of improvement of the land for any purpose of beneficial enjoyment, aside from the abstraction of water. The Court of Appeals<sup>2</sup> affirmed this judgment for substantially the same reasons as were assigned by the Supreme Court, holding that the adjoining land owner was protected against such abstraction of percolating water; that while the right existed in the municipality to obtain the water for the use of its inhabitants, yet the land owner was not required to submit to being despoiled of his property right

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<sup>1</sup> *Supra.*

<sup>2</sup> 164 N. Y. 522.

without compensation; that in order to acquire the right thus to despoil the land, the city could institute proceedings *in invitum* and acquire the right upon making compensation.

The second in order, and last of the decisions to which we shall call attention, is found in *Merrick Water Co. v. City of Brooklyn*.<sup>1</sup> The facts of this case presented two corporations, one private and the other municipal, both of which were engaged in extracting percolating water from the soil by similar means for purposes of transportation and sale. The Court held that the relative rights of such parties were not different in principle from the rights of adjoining land owners in respect to the subject-matter, and that as to percolating water the Court would not undertake to measure the respective rights of the parties therein; that as each was using the land for the same purpose, the rights of each were equal, and if one obtained more water than the other there could be no more ground of complaint than would exist if, in the improvement of their respective properties, one secured more water than the other or one was damaged and the other not. It was, therefore, held that no legal right was infringed. Upon appeal, this decision was affirmed by the Court of Appeals without opinion.<sup>2</sup>

So far, therefore, as the law in the State of New York is concerned, respecting property rights in percolating water, we may say, although with considerable diffidence, that it resolves itself substantially into the following rules:

*First.*—As to subterranean sources of supply to the fountain or running stream, they may not be diverted after they have reached the fountain or stream; nor can the source of supply be diverted if it cause any water actually in the fountain or stream to recede, no matter how slight be such recession. The usufruct is of the stream as an entity, and is not limited to the present particles of water therein.

*Second.*—The use of land solely for the purpose of abstraction of water does not confer any legal right to deprive

<sup>1</sup> 32 App. Div. 454.

<sup>2</sup> 160 N. Y. 657.

a fountain or running stream of water of its source of supply, whether such abstraction be accomplished by taking the water from the stream after it has entered it or the fountain, or by sucking away the percolating water before it has reached the open goal. Either or both acts are alike actionable.

*Third.*—The right of an adjoining land owner in the improvement of his property does not extend so far as to authorize interference with water after it has reached a spring or fountain which is part of a running stream, even though such interference is of the source of supply thereto before it reaches the open.

*Fourth.*—The right of an adjoining land owner in the improvement of his property, or for use upon his land, to intercept percolating water which reaches a running stream, but before it has arrived at such point, is not clear. The modern rule seems to be that such right is not absolute, but rests in the doctrine of reasonable use and relative rights, which in a given case will usually present a question of fact.

*Fifth.*—Adjoining owners own the percolating water in the soil by the same title upon which they hold the land. They may make such use of the water therein as they choose and are not liable for the interception of percolating water, even though it cuts off the supply of the adjoining owner.

*Sixth.*—The last preceding rule has no application where the purpose of use of the land is solely to obtain water from adjoining premises for purpose of transportation or sale. The abstraction of water under such circumstances infringes the legal right of an adjoining land owner, for which an action will lie.

*Seventh.*—No liability attaches to persons or corporations, as against each other, who are engaged in the use of land for the purpose of abstracting percolating water therefrom to transport or sell the same to others. Their rights as between themselves are equal and no action lies, although one may obtain more water from the same territory than the other.

EDWARD W. HATCH.

## THE INTERPRETATION OF WILLS—JARMAN'S FIFTH RULE.

AT the close of Jarman's treatise on Wills, the author summed up his conclusions in regard to the principles governing the construction of testamentary dispositions by putting them in the shape of twenty-four carefully phrased rules.

The fifth of these is "that the heir is not to be disinherited without an express devise or necessary implication; such implication importing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed."<sup>1</sup>

This was not an unfair formulation of expressions which had fallen from time to time from the lips of some of the greatest judges of England. Nevertheless, it aptly illustrates the impolicy of deducing a legal rule from observations found in reported opinions, without first subjecting them to a close and scientific inquiry, based upon the reason of things rather than on the course of judicial authority. The best statements of law ought to be, and generally are, those worked out by legal scholars occupying no official position, and unembarrassed in framing a definition by the pressure of circumstances or the desire to justify the decision of a particular controversy. Particularly is this true of the earlier English judicial definitions, thrown off in the course of an informal opinion, orally delivered and taken down, often with questionable accuracy, by unofficial reporters.

We first catch sight of the germ of Jarman's rule in the pages of Croke.<sup>2</sup> There we find it stated that in the case of *Spirt v. Bence*, determined in 1633,<sup>3</sup> the four Justices of the King's Bench "all agreed that the words in a will which disinherit the heir at the common law ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment."

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<sup>1</sup> 2 Jarman on Wills, \*1654.

<sup>2</sup> Croke, Car. I. 369.

Looking at these observations as a whole, it is obvious that the main thought at bottom is that a will must speak for itself, and speak plainly, if it is to divert the line of inheritance. Such an intent is not to be read into it "from any foreign intendment or averment." It is not to be helped out by pleading nor by guessing. The judges are following in the lines laid down, not many years before, by Lord Bacon in bringing out his famous maxims, as to latent and patent ambiguities. A deed, he argued, which left the estate granted uncertain, was not to be held by averment, for that were to pass without deed what by law could pass only by deed. Intention may be pleadable as matter of fact, to solve a question arising upon an equivocal description, but only in connection with material facts from which it can be inferred, and such facts must "stand well with the words" of the will.<sup>1</sup> To use Bacon's own illustration, if "I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words; but so it is not in variance, and therefore the averment must be of matter, that do endure quantity, and not intention. As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in that University of Oxford."<sup>2</sup>

So in *Spirit v. Bence*, the real thought is to use the expressions of Sir James Wigram, that "the judgment of a court in expounding a will should be simply declaratory of what is in the instrument."<sup>3</sup> The Judges were insisting that devises were not to be helped out against the heir by declaring on an intent which had to be looked for wholly outside of anything which the testator had written. To ejectment by the heir against A, who has taken possession under a claim of title by reason of a devise to B, it would

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<sup>1</sup> *Altham's Case*, 8 Rep. 155.

<sup>2</sup> *Bacon's Works*, Ed. 1803, IV, 80, 81.

<sup>3</sup> *Rules as to the Interpretation of Wills*, \*6, \*84.



be a bad plea that the testator had meant A when he named B.

Nearly forty years later Chief Justice Vaughan, in the Common Pleas, pushed on a long step farther. In *Gardner v. Sheldon*<sup>1</sup> he stated his views thus:

"An Estate given by implication of a Will if it lie to the disinheriting of the Heir at Law is not good, if such implication be only constructive and possible, but not a necessary implication. I mean by a possible implication, when it may be intended that the Testator did purpose and had an intention to devise his land to A, but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A, when A must have the thing devised, or none else can have it. And, therefore, if the implication be only possible, and not necessary, the Testator's intent ought not to be construed to disinherit the Heir, in thwarting the Dispose which the Law makes of the Land, leaving it to descend where the intention of the Testator is not apparently and not ambiguously to the contrary." \* \* \* "And where the words of a Will are of ambiguous and doubtful construction, they shall not be interpreted to the disinheriting of the right heir, as is already shew'd."<sup>2</sup>

As authority for these propositions, the Chief Justice cited *Spirit v. Bence*, quoting from that opinion as follows: "'That the words of a Will which shall disinherit the Heir at Common Law, must have a clear and apparent intent, and not be ambiguous or any way doubtful,' (so are the very words of the Book)." It will be observed, however, that he interpolates "any way" before doubtful, thus giving a decided gloss to the "very words" used by Croke.

Thirty years later, a will came before the King's Bench, in which there was a residuary gift to the executrix of the "overplus" of the estate. It was held that this did not pass the residuary lands.<sup>3</sup> Four opinions were pronounced, in three of which the rule now under consideration received attention. Powell, J., observed that "uncertain words in a will must never be carried so far as by them

<sup>1</sup> Vaughan, 259, 262 (1671).

<sup>2</sup> *Ibid*, 268.

<sup>3</sup> *Shaw v. Bull*, 12 Mod. 593 (1701).

to disinherit the heir at law." Chief Justice Trevor remarked that "where words in a will may be satisfied without carrying an estate from the heir at law, they shall never be construed to disinherit him, for the heir is not to be disinherited at all by any implication but such as are necessary, and without which the words would be rejected as void, and of no sense or signification." Nevill, J., who dissented, agreed that "the words of a will, to disinherit an heir at law, must be very plain and apparent in the will," but thought such an application was apparent in that then before them.

In 1735, Lord Hardwicke, in deciding against an heir, upon a will containing an introductory clause with general words as to the testator's disposing of his "worldly estate," said that "such general clauses have been often allowed as proper to expound the particular devises, and tho' they can't of themselves disinherit the heir at law without plain words, yet they serve very well to explain the testator's intention." This case<sup>1</sup> is cited by Jarman as an authority for his rule, but certainly does not support it, although it refers to *Gardner v. Sheldon* without disapproval.

Ten years later, the strict doctrine as to what was a necessary implication was again pressed on the great Chancellor, and again rejected, with these observations:

"It was said that there must be a necessary implication, and not a probable one only. It is true the court must not take conjecture for implication; there is hardly any case where an implication is of necessity, but it is called "necessary" because the court finds it so to answer the intention of the devisor."<sup>2</sup>

Shortly after the first of these two decisions of Lord Hardwicke, Chief Justice Willes had gone on the bench of the Common Pleas. He took an early opportunity to restate the rule. It was, he said, simply "that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited." In the form in which it was put in *Gardner v. Sheldon*, if "taken strictly, it would overturn a great many resolutions." Many of these he cites, adding: "But if Vaughan's rule were to hold, there would

<sup>1</sup> *Maudy v. Maudy*, cases *temp.* Hardwicke, 154 (1735).

<sup>2</sup> *Coryton v. Helyar*, 2 Cox, 339, 348 (1745).

be an end of this way of reasoning, and all those cases must be overturned." \* \* \* With *Spirt v. Bence*, he found no fault, remarking that it was "exactly agreeable to the rule which I have laid down in this case, and shews that the rule laid down by Vaughan in the case of *Gardner v. Sheldon*, is a new notion of his, and not the right rule."<sup>1</sup>

Similar views were thus expressed in 1773 by Lord Mansfield:

"It has been said that a necessary implication must mean when there is a natural impossibility that it should be otherwise. There never was such a construction put upon those words. A necessary implication is the implication arising upon the words the testator has made use of which clearly satisfies the court what was his meaning. It is put in opposition to conjecture. Conjecture is when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it. That is a conjecture; but for implication you must find out his meaning, whether expressed or implied, from his words." \* \* \* "Necessary implication, therefore, is that which leaves no room to doubt."<sup>2</sup>

It will be observed that the sentence last quoted, if it be consistent with what precedes it, is at least open to misconstruction. Where there is no room whatever for a doubt, the conclusion must be irresistible. It is no longer a question of probability, but of certainty.

In 1788, the question came up again in the King's Bench, when Grose, J., said that "to defeat the heir, it must appear to be the clear intention of the testator collected from the will, either by express words, or necessary implication, that the devisee should take," and Ashhurst, J., added that "courts of law have always so far favored the title of the heir at law as to lay it down as a rule that he shall not be disinherited but by a plain intention, and not by probable intention."<sup>3</sup>

<sup>1</sup> *Moone v. Heaseman*, Willes, 138, 140-144, and note. S. P. *Roe v. Wickett*, Willes, 303, 309.

<sup>2</sup> *Jones v. Morgan*, K. B. *Fearne on Cont. Rem. App.*, 111, 577, 589.

<sup>3</sup> *Doe v. Wilkinson*, 2 T. R. 213, 224; S. P. *Denn v. Mellor*, 5 T. R., 564.

Mr. Justice Ashhurst intensified this statement of the rule, a few years later, by commencing an opinion in favor of the heir by the remark that "the heir at law must recover the possession of this estate unless some other person be clearly and unequivocally entitled to take under the will."<sup>1</sup>

Soon after Sir James Mansfield became Chief Justice of the Court of Common Pleas, he declared the result of the cases where a devise of an estate was claimed on the one side to be a fee, and on the other but for life, to be "that an heir at law is not to be disinherited unless by words of limitation or by expressions which directly or by inference beyond all doubt shew an intention to give an estate in fee to the devisee."<sup>2</sup> *Spirit v. Bence* he regarded as a misapplication of this rule in favor of the heir, characterizing it as a decision to which he "never could have agreed." A few months later a similar point was being argued in the King's Bench, and counsel cited *Gardner v. Sheldon* as deciding that "the disinheriting of the heir at law is not good, if such implication be only constructive and possible, but not a necessary implication." At this, Lawrence, J., interposed the remark that "that rule is narrowed by Lord C. J. Willes to this, 'that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited.'" It was rejoined that in the case at bar no such plain intent was shown, but three of the four Justices (Lawrence, J., dissenting) finally held that there was, and gave the estate to the devisee."<sup>3</sup>

It remained for Lord Eldon to say the word which gave the final form and color to Jarman's rule. In *Wilkinson v. Adam*<sup>4</sup> he used this language:

"With regard to that expression 'necessary implication' I will repeat what I have before stated from a note of Lord Hardwicke's judgment in *Coriton v. Hellier*, that in construing a will conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention

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<sup>1</sup> *Thomas v. Thomas*, 6 T. R. 677 (1796).

<sup>2</sup> *Doe v. Child*, 4 East, 345 (1805).

<sup>3</sup> *Trent v. Hanning*, 7 East, 106.

<sup>4</sup> 1 V. & B. 459, 466.

contrary to that which is imputed to the testator cannot be supposed."

It is this which Jarman substantially repeats.

Powell, in his work on Devises, came to nearly the same result. This is his statement of the rule:

"Where a court cannot find words in a will which either expressly or by necessary implication denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents, which are certain, must prevail and cannot be superseded by an uncertain devise."<sup>1</sup>

According to this canon of interpretation, that the heir is to be protected wherever there is the possibility of a doubt, he stands substantially where Lord Eldon put him.

Lord Ellenborough, it may be noted, the year after the decision in *Wilkinson v. Adam*, had given his view of the matter thus:

"The rule of law is peremptory that the heir shall not be disinherited, unless by plain and cogent inference arising from the words of the will."<sup>2</sup>

All the authorities which have been cited assume that there is some rule of law which may be appealed to in any contest between heir and devisee. If so, who made it, and who had a right to make it?

"*Regula est, quæ rem, quæ est, breviter enarrat. Non ut ex regula jus sumatur sed ex jure quod est, regula fiat.*"<sup>3</sup> Lord Bacon, in commenting on this passage in his treatise *De Dignitate et Augmentis Scientiarum*, pushes the thought a step further:

"*Recte jubetur, ut non ex regulis jus sumatur; sed ex jure quod est, regula fiat; neque enim ex verbis regulæ petenda est probatio, ac si esset textus legis; regula enim legem (ut acus nautica polos) indicat, non statuit.*"<sup>4</sup>

Rules are nothing unless there is a reason behind them, nor unless they are the fair expression of what before was law. The review of the English cases, which has been attempted in this article, indicates that Jarman, while cling-

<sup>1</sup> Powell on Devises, \*411.

<sup>2</sup> *Doe v. Dring*, 2 M. & S. 448, 452 (1814).

<sup>3</sup> Dig. L., 17, *de diversis regulis, etc.*, 1.

<sup>4</sup> Works, Ed. 1803, 459.

ing close to certain judicial phrases, has given them out of their proper connection and limitations. His fifth rule has been either approved or cited without disapproval in many American cases.<sup>1</sup> But it is difficult to make it square with what certainly is law, namely, that to ascertain the intention of the testator the words he has used are to be construed favorably *ut res magis valeat quam pereat*. A will is not to be read like a plea in abatement. It is to be interpreted fairly, as to all who are affected by it.

"Words are, at times, but an imperfect vehicle of thought, even when used in oral speech and explained by all that look, tone and gesture can supply. Still more, in the case of the dead, when what they intended to express is to be gathered from a written document, must this meaning be often a matter of probability, rather than certainty. The probability, indeed, on which is rested a devise or bequest by implication must be apparent, and not a mere matter of conjecture; but it need not, even as against the heir, be necessarily such that from the words employed an intention to the contrary cannot be supposed."<sup>2</sup>

Dr. Lieber, in his *Legal and Political Hermeneutics* defines "interpretation" thus:

"Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey."<sup>3</sup>

As applied to written instruments affecting rights of others, this definition must be so far restrained as to make the object of inquiry the intention as manifested by the language used. But with this modification, it is as true as to wills as in respect to any other documents, and if it be sound, Jarman's fifth rule is not.

SIMEON E. BALDWIN.

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<sup>1</sup> See *Bradford v. Bradford*, 6 Wharton, 244; *Rupp v. Eberly*, 79 Pa. St. 141; *Gibson v. Seymour*, 102 Ind. 485; 2 N. E. 305.

<sup>2</sup> *Weed v. Scofield*, 74 Conn.; 49 Atl. 22.

<sup>3</sup> p. 11.

## IMPOSSIBILITY OF PERFORMANCE, AS AN EXCUSE FOR BREACH OF CONTRACT.

IN a recent New York case, *Buffalo and Lancaster Land Company v. Bellevue Land and Improvement Company*<sup>1</sup>, the Court of Appeals has held that under a contract to construct an electric street railway and run electric cars thereon "as often as once every half hour from seven A. M. to eight P. M. each day, as such street railroads are usually run," a failure on account of heavy snow storms and high winds to run cars at the required intervals during the whole or a substantial part of the period of four months, was excusable, and therefore did not justify the rescission of the contract. The decision is a somewhat novel one, and has served to call attention to the fact that there is considerable judicial uncertainty in the application of the rules with reference to subsequently arising impossibility as an excuse for failure to perform a contractual duty.<sup>2</sup>

The general rule, that impossibility of performance arising subsequently to the formation of the contract does not excuse the contractor was established in the early case of *Paradine v. Jane*,<sup>3</sup> where it is declared that "where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. \* \* \* But where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract.*" To this rule three exceptions have long been recognized: First, where legal impossibility arises from a change in the law. Second, where a specific thing the continuation of which is essential to the performance of the contract is destroyed. Third, where under a contract which has for its object the

<sup>1</sup> 165 N. Y. 247.

<sup>2</sup> See 15 Harv. L. Rev., note on p. 63.

<sup>3</sup> Aleyn, 26 (1178).

rendering of personal service, the promisor dies or becomes physically incapacitated.<sup>1</sup>

The first of these exceptive rules has no reference to the intention of the parties, but is based solely upon considerations of public policy. The second and third, on the contrary, rest on the theory of a condition implied in the contract, and have been adopted with the avowed purpose of giving effect to the will of the parties to the contract. The first rule seems to have been uniformly applied without question and with little difficulty, but an examination of the cases arising under the second and third reveals a pronounced tendency to extend their limits—or rather to apply the theory of an implied condition excusing failure to perform in cases other than those enumerated. The case of *Buffalo and Lancaster Land Company v. Bellevue Land and Improvement Company*,<sup>2</sup> to which reference has already been made, is a striking illustration. The subject matter of the contract—the street railway—was not destroyed. It simply became impossible to operate it according to the distinct and unqualified terms of the contract because of unusually severe winter weather—obviously, a case not within the original bounds of the second rule. And there are many other cases in which departure from the rules is equally pronounced.

This being the situation, two questions present themselves: First, Do the second and third rules, as stated, comprehend all of the cases in which, upon principle, a condition ought to be implied? Second, If not, what extension or modification of those rules should be made? The first inquiry, as is intimated, may be answered without hesitation in the negative. There are a number of cases in which, while the parties are not physically incapacitated and there is no destruction of a specific thing essential to the performance of the contract, such performance becomes impossible by reason of a contingency arising without fault of either party which should clearly operate as a discharge. Thus, in *Howell v. Coupland*,<sup>3</sup> the defendant, in March, agreed to sell to plaintiff two hundred tons of regent

<sup>1</sup> Anson on Contracts, Ninth Edition, pp. 333-4.

<sup>2</sup> *Supra*.

<sup>3</sup> 1 Q. B. D. 258.



potatoes *grown on land belonging to defendant in Whaplode*, at a specified rate per ton, to be delivered in September and October and paid for as taken away. In March the defendant had sixty-eight acres ready for potatoes, which were afterwards sown and were amply sufficient to have grown more than two hundred tons in an ordinary season; but in August, without any default in defendant, a disease attacked the crop and defendant was able to deliver only about eighty tons, the rest of the crop having perished. If the defendant had possessed other land to plant with potatoes, at the time when the disease was discovered, which in fact he did not, it would have been too late to sow it. In an action to recover damages for the non-delivery of the residue of the two hundred tons, it was held that the contract contained an implied condition that the potatoes should be in existence when the time came for performance and that the failure to deliver was therefore excused. Said Cleasby, B.: "Here there was not an absolute contract to deliver two hundred tons of potatoes in September and October, but two hundred tons of potatoes grown on particular land. \* \* \* The crop on this particular land has failed and there is nothing to which the promise can apply. If the crop had existed at the time of the contract and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract."

Again, in *Dolan v. Rodgers*,<sup>1</sup> it appeared that the defendant, a contractor under a railway construction contract which provided that contractors would not be allowed to subcontract any part of the work without consent of the railway company, sublet a part of the work to the plaintiff's firm at a stipulated rate, without consent of the company. Both parties to the subcontract were aware of the provision in the contract with the railway company and of the fact that the consent of the railway company had not been given. The plaintiff's firm performed part of the work required by their contract, but was prevented from completing it by the railway company, and in an action to

<sup>1</sup> 149 N. Y. 489.

recover a balance alleged to be due on the subcontract, the defendant claimed that the plaintiff should not be allowed to recover but should pay damages for not completing performance of his contract. The Court held for the plaintiff, declaring that the failure of his firm to perform the contract was excusable. "We think," said Vann, J., "that as both parties had in view the contingency that performance might not be permitted by the railroad company, it was an implied part of their contract that if such were the result, both were to be released as to the future, but bound as to the past."<sup>1</sup>

The justice of these decisions does not appear to be open to serious doubt, and consequently it is believed that they should be supported. We are therefore brought to the second inquiry: What extension or modification of the rules should be made? Perhaps the natural impulse, even after a study of the cases, is to assert that, upon principle, a condition excusing performance should be implied in every case in which the parties, if their attention had been called to the contingency would probably, as reasonable men, have made it an excuse by express terms of the contract. Such a rule would certainly find support in some of the authorities and its application would probably lead to equitable results in a very large proportion of cases. On the other hand, however, it is open to the very grave objection that it would open wide the door of escape from the express terms of contractual obligation. It is the recognized policy of the law that men, in their ordinary dealings, act with their eyes open and that they do not enter into a contract without having duly weighed the consequences which may follow. The responsibility, therefore, rests upon a contractor to anticipate and guard against difficulties, and provide for such contingencies as are likely to intervene. And to empower a court, in every case in which the enforcement of the express terms of a contract would, on account of subsequently arising impossibility, result in hardship, to assume that had the attention of the parties been called to the contingency it would have been provided for, and to act upon the fiction that it impliedly was provided for, is simply to enable it to make a contract for the parties very

<sup>1</sup> See also *Lorillard v. Clyde*, 142 N. Y. 456.

different from that which the parties had made for themselves.

The great importance of guarding, so far as possible against such a result, is obvious. And it is believed, therefore, that a more restrictive rule must be found. With that end in view, the following is suggested: *If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused.* In other words, the proper inquiry is not: Would the parties, as reasonable men, if their attention had been called to the contingency, have provided for it in their contract? That, as has been said, would be making a contract for them different from that which they had actually made for themselves. But: Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it, as already made by the parties.

This proposition does not appear to have been consciously recognized as a test in any of the adjudged cases. But let us apply it to some of the more important decisions and see what will be the result. The many cases involving loss or destruction of the subject-matter of the contract fall very readily within it. Thus, in the frequently cited case of *Dexter v. Norton*,<sup>1</sup> in which certain bales of cotton which defendant had contracted to sell to plaintiff were accidentally destroyed by fire without the fault or negligence of the defendant, the Court, in holding the defendant to be excused, might well have said, not merely that the parties are presumed to have contemplated the continued existence of the cotton, but that it was so obvious that the obligation to perform depended upon the continued existence of the cotton that provision for the contingency could not reasonably be expected. In other words, had the defendant referred to the fact that performance might be prevented by the destruction of the cotton, it would have been so obvious that such destruction would excuse the defendant that it would not have been thought necessary by them, as reason-

<sup>1</sup> 47 N. Y. 62.

able men, to so provide in the contract. The same is true of the equally well-known English case of *Taylor v. Caldwell*,<sup>1</sup> where A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned. The continued existence of the hall was so obviously a condition of the obligation that its expression would have appeared to the parties to be entirely superfluous.

The cases falling under the third of the old exceptive rules—those in which one who has contracted to perform personal services dies or becomes physically incapacitated—are so readily seen to be included within the proposed substitute that discussion of them is unnecessary. A contract of that nature would be regarded by every reasonable man as one the obligation of which would be terminated by death or incapacitating illness of the contractor, and the inference is so plain that to expressly provide for it in the contract would seem to him to be utterly needless.

Turning to cases which are clearly beyond the bounds of the old rules, and in the decision of which the courts have shown some uncertainty, it is found that the proposed test might have been applied without serious difficulty and with harmonious and generally equitable results. In *Dolan v. Rodgers*,<sup>2</sup> it was proved as a matter of fact that both parties actually had in view the contingency that performance might not be permitted by the railroad company. Then why did they not expressly provide that such action by the railroad company would operate as a discharge? Because the effect was so evident that the idea of inserting it as a condition did not even suggest itself. And so the contractor was excusable, not because of a presumption that the parties, had their attention been called to the fact, would have provided for it in the contract (their attention *was* called to the fact, and yet they did not provide for it), but because the contingency was so plainly "outside the contract" that reference to its effect was unnecessary.

It would seem that the same cannot fairly be said of *Lovering v. Buck Mountain Coal Company*,<sup>3</sup> and *Buffalo*

<sup>1</sup> 3 B. & S. 826.

<sup>2</sup> *Supra*.

<sup>3</sup> 54 Pa. St. 291.

and Lancaster Land Company *v.* Bellevue Land and Improvement Company,<sup>1</sup> and that the decisions in these cases, excusing failure to perform, cannot, under the application of the proposed rule, be supported. In the former case, the contract was for the sale and delivery of "Buck Mountain Coal," and the contingency which prevented its performance was the destruction by flood of certain navigation works, without the use of which it was impossible for the coal company to get its output to market. In the course of his opinion, Reed, J., said: "The Lehigh Coal and Navigation Works, therefore, became an indispensable and all-important link in their chain of transportation; a fact well known to all their customers, as well as the quality of their coal, and the mines from which it was taken. Of course all contracts made with the defendants were made in full view of these facts." In the absence of any evidence on the point, it seems rather strange that the court should say that as a matter of course, all persons who bought coal from this company were aware of the fact that there was only one way of reaching the market, and that that way involved the use of certain navigation works which might be destroyed by flood. But assuming such to be the case, is it not probable that the purchaser would expect the seller to assume the risk of such a contingency? Is it not quite possible that had attention been called to the fact, the purchaser would have refused to consent that the seller should be excused in case of destruction of the navigation works? And assuming that he would have consented, is it not practically certain that the parties, as reasonable men, would have deemed it of the highest importance that the stipulation should be expressly stated in the contract? If so, the seller should not, in the absence of stipulation, be excused.

In Buffalo and Lancaster Land Company *v.* Bellevue Land and Improvement Company,<sup>2</sup> the court says: "The whole contract and its purpose and object must be brought into view, and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do things that were impossible." But parties to

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<sup>1</sup> *Supra.*

<sup>2</sup> *Supra.*

contracts frequently assume the risk of possibility of performance; and in the absence of express provision against that risk, it should be presumed that the risk is assumed, unless of such a nature that it obviously would not be assumed by reasonable men. In this particular case, it will be recalled, one party agreed to run electric cars at half-hour intervals, and no provision was made for the effect of unusually severe winter weather. It is probable that the contingency was not present in the minds of the parties when the contract was made. Had it been suggested, would they have inserted a clause excusing any failure, from that cause, to run cars at the stipulated intervals? Perhaps they would. But is it at all certain or obvious? Might they not have made some compromise on that point, such as a provision for compensation for any loss resulting from such a contingency? If so, to excuse the contractor entirely, in the absence of any stipulation, is to seriously modify the express terms of the contract, without any certainty that such modification is in accord with the intention of the parties, or with what would have been their intention, had the contingency been called to their notice. Since it cannot be said that interference of weather so manifestly excused failure to perform that the parties would have regarded it as superfluous to so provide, it should be presumed that they did not provide for it, because they did not intend it to be an excuse. In justice to the decision in this case, however, it should be noticed that the stipulation to the effect that cars should be run as often as once every half hour from seven A. M. to eight P. M. each day, was followed by the words "as such street railways are usually run." Just what was intended to be the significance of this phrase it is impossible to determine. The court regarded it as giving additional support to its decision excusing the breach, but the more reasonable construction would seem to be that the words do not qualify the stipulation as to time, but require, in addition, that the mode of operation conform to that of well-regulated street railway systems. It must be admitted that a refusal by the court to excuse the contractor in this case would have resulted in the imposition of a rather severe penalty—the acceptance of a reconveyance of the land and the restoration of the pur-

chase-price—and it is probable that this apparent hardship had some influence with the court. But the hardship would have been almost as great had the breach resulted from the negligence of the contractor, and it must be borne in mind, as has already been pointed out, that even though hardship occasionally result, it is sound policy to hold men to the express terms of their agreements.

Another New York case, the conclusion in which appears to be at least of doubtful propriety, is that of *Booth v. The Spuyten Duyvil Rolling Mill Company*,<sup>1</sup> the court having then gone to the other extreme and held a contractor to strict accountability for a failure to perform that was unavoidable, whereas there was strong reason for excusing him. The plaintiff having contracted to sell and deliver to a railroad company four hundred tons of rails, made of iron with steel caps, contracted with defendant to furnish the caps. By the terms of the agreement, defendant was "to make and deliver at their mill, on the Spuyten Duyvil Creek, Westchester County, one hundred tons of steel caps for rails, the same to be completed and delivered on or before April 1, 1868, with the privilege to deliver the whole or any part (not less than twenty tons at a time) during the months of January, February and March." On the tenth of March the rolling mill of the defendant was consumed by fire, and as a result the defendant was unable to perform within the stipulated time. In an action by the plaintiff for damages resulting from such failure to perform, it was held that the defendant was not excused by the burning of the mill, the court resting its decision upon two separate grounds: First, that the performance of the contract, by the exercise of due diligence, might have been completed before the mill was destroyed; second, that the contract did not require the caps to be made at that particular mill, and that performance might have been completed elsewhere. With reference to the first reason the court says: "A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. The defendant took the responsibility of the delay." This is manifestly absurd. At the time of the destruction of the mill there remained three

<sup>1</sup> 60 N. Y. 487.

weeks within which to manufacture the caps, and it does not appear that that period of time was too brief for the purpose. Surely, it did not devolve upon the defendant company to enter upon the performance immediately after the contract was made; it had the right to perform at any convenient time before April 1, and the fact that performance was not commenced on March 10, is not in itself the slightest evidence of neglect.

As to the second reason, the words of the court are as follows: "There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manufactured and delivered, and whether by that particular machinery or in that mill would not be deemed material. True, the contract specifies the mill as the place, but it necessarily has no importance except as designating the place of delivery. For aught that appears, other machinery could have been substituted. The defendant agreed to furnish a certain manufactured article by a specific day, and it cannot be excused by an accident, even if it prevented performance." If the court is right in saying that the contract was for the manufacture of caps unconditionally and without reference to place of manufacture, the decision cannot be questioned. In that form the case strongly resembles that of *Turner v. Goldsmith*,<sup>1</sup> in which the plaintiff having been employed by contract in writing, for a period of five years to sell goods "manufactured or sold" by the defendant, and the defendant's factory having been destroyed by fire after about two years, the court held that defendant was not thereby excused from fulfilling his agreement, Lord Justice Kay saying: "If it had been shown that not only the manufactory, but the business of the defendant had been destroyed by *vis major*, without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement." Such a construction of the contract in the New York case, however, seems hardly justifiable. The defendant, presumably, owned only the one mill, and the language of the agree-

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<sup>1</sup> 1 Q. B. D. 544.



ment makes it very clear that the parties contemplated that the goods were to be there manufactured ; so that the case seems to be more strikingly analogous to *Howell v. Coupland*,<sup>1</sup> where the contract was for the sale of potatoes "to be grown on land belonging to defendant in Whaplode," and the later New York case of *Stewart v. Stone*,<sup>2</sup> where the defendant, having agreed to receive plaintiff's milk at his factory, make from it butter and cheese and sell the product, was held to be excused from performance by the destruction of the factory. In *Howell v. Coupland* the contract became impossible of performance because the land specified did not yield a sufficient quantity of potatoes ; in the two New York cases because the factory specified was destroyed. All three are conceded to be very close cases, but it is believed that the English and the later New York decisions are to be preferred ; that performance of the contract was in each case so obviously dependent upon a certain state of affairs that it would have appeared superfluous to provide that the parties should be excused in case that state of affairs should cease to exist.

Similar to the cases just considered, and difficult to distinguish from them, is *Anderson v. May*.<sup>3</sup> There the contract was that of a seed grower to sell and deliver certain quantities of specified kinds of beans. The contract was proved by letters passing between the parties, from which it fairly appears that the beans were to be grown by plaintiff, but not on any particular land. As an excuse for not delivering the entire quantity the seed grower relied on proof of the fact that an early, unexpected frost had injured his crop to such an extent as to make delivery impossible. The court held that he was not excused, citing *Howell v. Coupland* <sup>4</sup> as a case in which the exception had been extended further than in any other, and adding : "Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and de-

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<sup>1</sup> *Supra*.

<sup>2</sup> 127 N. Y. 500.

<sup>3</sup> 50 Minn. 280.

<sup>4</sup> *Supra*.

liver part of a specific crop, but a general undertaking to raise, sell and deliver the specified quantity of beans." In this view of the case it rests upon the same ground as cases of the class represented by *Ashman v. Cox*.<sup>1</sup> There the defendant sold to plaintiff two hundred and fifty bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers between May 1 and July 31, 1898, the agreement containing a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish-American war it was in a business sense impossible for defendant to ship hemp by sailer between the specified dates, but it was held that the failure was not thereby excused. The court construed the express clause "loss of vessel or other unavoidable cause" to apply only to goods actually shipped, and declared that there was no implied condition in the contract as to impossibility of shipment resulting from war, but that the defendants had taken upon themselves the absolute responsibility to deliver the hemp according to the express terms of the agreement. Tested by our proposed rule, the decision in this case is undoubtedly correct, as it is by no means so obvious that the obligation of the contract depended upon the non-occurrence of the event which made it impossible of performance that the insertion of a provision to that effect would have been regarded as superfluous.

There are a number of cases in which relief has been sought from the obligation of contracts for personal services, not on account of death or illness, but because of the danger of physical harm entailed in an attempt to perform. Thus, in *Lakeman v. Pollard*,<sup>2</sup> a laborer in a mill claimed that he was justified in quitting work because of the prevalence of cholera in the vicinity of the mills, and it was held that if the jury found that it was in reality unsafe for him to remain at work, the breach was excusable. The same is doubtless true in case a man quits work because of danger of physical injury from strikers.<sup>3</sup> Such cases may readily be assimilated to those in which impossibility results from

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<sup>1</sup> [1899] 1 Q. B. D. 439.

<sup>2</sup> 43 Me. 463.

<sup>3</sup> *Walsh v. Fisher*, 102 Wis. 172.

actual illness or physical injury, for under no circumstances should a man be expected "to daily carry his life in his hands." That they are properly decided under our proposition, need not be demonstrated.<sup>1</sup>

Many other interesting cases in which the question of impossibility has arisen may be found,<sup>2</sup> but it is believed that those already discussed amply establish the unsatisfactory nature of the rules heretofore generally accepted, and the consequent rather uncertain state of the law. Owing to the fact that there are so many cases in which the equities between the parties are remarkably balanced, and to the further fact that in many instances it seems almost impossible logically to differentiate cases between which one intuitively feels that there is a distinction, absolute uniformity in the decisions is practically unattainable. But it is believed that the rule that has been suggested herein and experimentally applied to some of the adjudged cases, would have a considerable tendency to diminish confusion, and would be in far greater accord with the cases already decided and with equitable principles, than the rules which are now supposed to state the law.

FREDERIC C. WOODWARD.

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<sup>1</sup> See also *Dewey v. Union School District*, 43 Mich. 480, and *McKay v. Barnett*, 21 Utah, 239, holding that the closing of schools by reason of epidemic of contagious disease does not make performance by School Board of contract with teacher impossible, and does not excuse failure to pay his wages.

<sup>2</sup> See *Nicol v. Fitch*, 115 Mich. 15; *Board of Education v. Townsend*, 63 Ohio St. 514; *Hall v. School District*, 24 Mo. App. 213; *Herter v. Mullen*, 159 N. Y. 44; *Shear v. Wright*, 60 Mich. 159; *Allen v. Baker*, 86 N. C. 91.

# COLUMBIA LAW REVIEW.

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In our November issue Professor Keener was referred to as Dwight Professor of Law. In fact—the correction is made for purposes of record—Professor Keener holds the Kent, and Professor Burdick the Dwight Chair of Law.

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## NOTES.

**SURVIVAL OF AN ACTION FOR LIBEL AGAINST A CORPORATION, AFTER DISSOLUTION.**—That an action for libel survives the dissolution of a corporation and may be continued against the directors, in office at the time of such dissolution, as trustees, is the holding of *Shayne v. Evening Post Publishing Co.*, 168 N. Y. 70 (Oct. 1901), reversing the decision of the Appellate Division, 56 App. Div. 426. Counsel for the defendant moved that the suit be abated, as the corporation had expired by the limitation in its charter. The Appellate Division refused to revive the action against the trustees, on two grounds: First, because the Laws of 1875, c. 611, and Laws of 1892, c. 601, did not apply, and second, as stated by McLoughlin, J. (p. 427), because "The general rule is, in an action to recover damages for personal injuries pending at the time of the death or dissolution of a defendant, the action abates and cannot revived." Two judges dissented, HATCH, J., on the ground that in an action against a corporation the remedy was not against the person, but against the corporate property, which could be followed in the hands of the trustees; and also, because of the precedent set by the case of *Hepworth v. Union Ferry Co.*, 62 Hun, 257 (1891), affirmed, although no opinion was written, by the Court of Appeals in 131 N. Y. 645. The Court of Appeals treats the case as one

of the first impression, PARKER, C. J., saying (p. 73): "Nor are we foreclosed by authority in this court from considering the question on its merits, for neither the diligence of counsel nor patient investigation on our part has brought to light any decision of this court bearing directly on the question." In reviving the action, the court based its decision approximately on the ground set forth by HATCH, J., *supra*, namely, that if recovery be had, the moneys required to satisfy the judgment would be taken from the assets of the corporation and, whether before or after dissolution, would in any event diminish the assets of the shareholders.

As a principle of abstract justice, this decision is doubtless beyond fault, but is there such a difference between the death of a natural person and that of a corporate entity as to prevent the survival of an action *ex delictu* against executors and to allow survival against the trustees of a corporation? At common law all actions of tort were ended by the death of either party *pendente lite*, and it was by statutory enactment alone that executors were rendered liable. The New York Revised Statutes (2 R. S. 447) providing for the maintenance of an action against the personal representatives of a wrongdoer, expressly except actions for libel and slander. Hence no question could have arisen as to the revival of the action in the principal case, had the defendant been a natural person. In New York by the "General Corporation Laws," § 30, the directors of the defunct corporation become trustees and are to divide the property among the shareholders, after paying the creditors of the corporation. Judging by the statute alone, we can see no difference between the death of an individual and the dissolution of a corporate entity. In *National Bank v. Colby*, 21 Wall. 609 (1874) at p. 615, FIELD, J., lays special emphasis on the analogy between the death of an individual and the dissolution of a corporation, saying: "Its existence was thereupon ended; it was then a defunct institution and judgment could no more be rendered against it in a suit previously commenced, than judgment could be rendered against a dead man."

In the principal case, in adverting to the rule, *Actio personalis moritur cum persona*, the court held that 2 R. S. 447, did not apply to corporations, and that actions for libel could be revived, distinguishing the cases on the ground that the reason for executors' non-liability is that they, in their personal capacity, have committed no wrong, whereas in a similar action against the trustees of a defunct corporation the remedy of the plaintiff is against the property of the corporation solely. This line of argument is based on the ground given in allowing a contract action to survive against executors, namely: "The object of the action *ex contractu* being to reach the property rather than the person, in which the executors have now the same interest that the testator had before, such action should be revived and continued" (p. 79). But, while the remedy is against the property of the shareholders in an action, either in tort or contract, the action of tort is, nevertheless, brought on account of the wrong done by the corporation, a wrong of which

the shareholders are as guiltless as would be the executors of a natural person in a similar case. It would be as well to say that, where executors are legatees under the will of the testator, they should be liable in damages for the tort of the deceased, since they profit by taking a share of his property. Such a proposition would lose sight of the fact that the action of tort, while remedial as viewed on the part of the plaintiff, must of necessity be based on a wrong done by the defendant. The cause of action in tort can not be considered as standing on the same basis as an action on contract, despite the holding in *Hepworth v. Union Ferry Co.*, *supra*, that peculiar result having been reached on account of a special provision in the charter of the ferry company, rendering it liable for action *ex delictu*, even after dissolution. This was pointed out in *Matter of Yuengling Brewing Co.*, 24 App. Div. 223 (1891); the latter case holding that the action for personal injury did not survive.

One further point, dwelt on by the Court, must be considered. In speaking of 2 R. S. 447, PARKER, C. J., says (p. 78): "Nor has the language of our statute which authorizes the continuance of certain actions for moneys against the executors and administrators of wrongdoers, but excepts actions for libel, slander, assault and battery and false imprisonment, been held to include the civil death of either individuals or corporations, and it is sufficient for our present purpose to say that such an intent on the part of the Legislature cannot be spelled out of the language employed by it." The dissolution of a corporation may be called a civil death in order to distinguish it from the physical dissolution of a human being, but in no way does it resemble the civil death of an individual. For, in the case of the individual, the person lives on after the civil death, while on the dissolution of the corporation, the entity or artificial being ceases to exist and can not be revived or reborn, save by an act of the Legislature. *National Bank v. Colby*, *supra*.

Hence, whether it be a person or a corporation which has done an injury, the effect of the death of the former or the dissolution of the latter should be identical; for, in each case, the entity of the wrongdoer has passed away and an action against executors on the one hand, or trustees on the other, would, in effect, tend to fasten pecuniary liability on persons who have done no wrong.

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RATIFICATION BY AN UNDISCLOSED PRINCIPAL.—Roberts, a broker, was authorized by the defendant to buy wheat at 45s. 3d. Such purchase being impossible, he bought from the plaintiff at 45s. 6d., hoping that the defendant would take over the contract, and intending it to be for his benefit. The defendant approved Roberts' action, and took over the contract, but later refused to perform. On these facts the House of Lords has decided that the defendant acquired no right and incurred no liabilities on the contract by his attempted ratification, since Roberts did not *profess* to be acting

for any other than himself. *Keighley, Maxted & Co. v. Durant* (1901) A. C. 240.

The decision is put on these grounds: (1) that the question has already been settled by the authorities; (2) that even were this not so, when a contract has once been closed, the parties thereto are fixed as unalterably as any other of its terms; (3) that to discover and prove what the intention of the agent was is an impossibility; and (4) that to permit such a ratification would be to add an anomaly to the already anomalous doctrine of the undisclosed principal.

The counsel for the plaintiff "boldly" asserted that the opinions upon the point are mere *dicta*, and that the case has never been decided. Though the court thought otherwise, the cases cited do not support its holding. In not one of them has the point been raised; in these cases the agent has either openly professed to act for his principle, *Ancona v. Marks*, 7 H. & N. 685 (1862); *Bobbell v. Pinnell*, 1 Ex. 368 (1876), or, he has not intended so to act, and has therefore not professed so to act. *Saunderson v. Griffith*, 5 B. & C. 909 (1826); *Vere v. Ashby*, 10 B. & C. 288 (1829); *Wilson v. Tumman*, 6 M. & G. 236 (1843); *Falke v. Ins. Co.*, L. R. 34 Ch. Div. 234 (1886). It is true that in all these cases the language used is that as the agent *professed* to act, or did not *profess* to act on behalf of another, that other might or might not ratify the act. As applied to the facts presented there for decision, the language is suitable; but it cannot be taken as decisive of the point here involved. Had this case been in the minds of the judges there speaking it is conceivable that their language would have been different. In *Bird v. Brown*, 4 Ex. 786 (1851), there is a *dictum* directly on the point *contra* to the principal case, and though the *dictum* is omitted in another report of the case, 19 L. J. (N. S.), 154, it is more probably an omission in the latter, than an addition in the former case. Finally, the case of *Soames v. Spencer*, 1 D. & R. 32 (1822), is dismissed with the short statement that it does not appear what was the form of the contract sued on. But the decision was that, where one of two co-tenants of land contracts to sell the whole land as his own, intending to act for his co-owner, the co-owner can ratify the contract. And in *Foster v. Bates*, 12 M. & W. 226 (1843), the court says that wherever one *means* to act for another, a subsequent ratification is equivalent to a prior command. *In re Tiedermann v. Ledermann* (1899) 2 Q. B. 66, holds that a contract made by an agent professing to act for another, but intending in his own mind to act for himself can be ratified. The case is right, for a man could not be allowed to contradict his expressed intention.

Though, as a general rule, a contract once made is closed, and the terms thereof cannot be changed, yet there is a large class of cases in the law of agency, in which on equitable grounds a new party is introduced, both to sue and to be sued. If this be true where there is a prior authority, it should be true where there is a ratification, for a ratification is the equivalent of a prior authority. Bracton de Legibus, f. 171 b; *Dean, etc., of Exeter v. Serie de Lanlarason*, Y. B. 30 Ed. I, 126, 129. So logically is

this doctrine applied that it has been held that the ratification of an act, involves the ratification of torts committed by the agent in its performance. *Dempsey v. Chambers*, 154 Mass. 330 (1891). In the case under discussion, therefore, the defendant should have been treated as an undisclosed principal. If it be argued that the third party did not know that he was contracting with any other than the agent, it should be remembered that he would not have known this fact, had there been a prior authority. In both cases the agent secretly intends to benefit another. If in the one case the third party suffers no harm, and equity requires that the undisclosed principal be liable, so does it equally in the other, for, as regards the third party, the cases are identical. Likewise, as between the principal and agent the case is unchanged, whether the agent *profess* to act for the principal or no. In both cases he does act for the principal, and in both cases the principal assents to the act.

If the court decides the case on the difficulty of proving what was the intention of the agent, it grounds its decision arbitrarily on its conception of convenience, and not on the principles of law involved in the case. It is to be noted, moreover, in this connection, that the state of a man's mind in cases of conditional contracts where performance is to be to the defendant's satisfaction, is examined and determined. *Brown v. Foster*, 113 Mass. 136 (1873); *Exhaust Ventilator Co. v. C. M. & St. P. R. Co.*, 66 Wis. 218 (1886).

Finally, though it be true that the doctrine of the undisclosed principal is anomalous from the point of view of contract law, yet it is as firmly settled in the law of agency as that of either the named or unnamed principal; that is to say, principals may be named, unnamed or undisclosed. Each is capable of acting through an agent having a prior authority. A ratification is the equivalent of a prior authority. Each should, therefore, have the right to ratify. And yet the decision in this case denies the right to an undisclosed principal. Surely the result of the decision is an anomaly in the law of agency.

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THE TAFF VALE RAILWAY CASE.—A decision of importance in its effect upon the English law relating to labor organizations, was handed down in July by the House of Lords. *Taff Vale Ry. v. Amalgamated Society of R'y Servants* (1901) A. C. 426. The case turned on the construction of the Trade Union Acts, 1871 and 1876; the question being whether a union registered under the Acts could be sued in its registered name. These statutes do not provide for incorporation, nor do they, in terms, allow suits to be brought in this manner; but they recognize the legal validity of the unions, make provision for their registration, for the vesting of property in trustees, and for the bringing of actions in respect of such property in the name of the trustees.

In the principal case, suit was brought for an injunction and damages for unlawful picketing; picketing, except when the acts are committed for the sole purpose of obtaining or communicating information, being made illegal by English statutes, and all picketing



being said to be a nuisance at common law. *Lyons v. Wilkins* [1899] 1 Ch. 255. At chambers, FARWELL, J., held that the suit against the defendant union was properly brought in its registered name, although the society was neither a corporation, a partnership nor an individual; declaring that inasmuch as the Legislature had given these bodies the capacity to hold property and to act through agents, in the absence of express enactment, it must have intended that they should be liable at law for the acts of such agents. Reversed by the Court of Appeal, (1901) 1 K. B. 170, the judgment of FARWELL, J., was adopted and restored by the House of Lords without dissent.

The case was one of first impression. That the point raised by the plaintiff has not been argued before during the thirty years which have elapsed since the enactment of these statutes, in spite of the great mass of litigation relating to trade unions, is not without significance as showing a construction put upon the Acts by the profession directly opposed to that now adopted by the court of last resort. The nearest analogies are decisions holding that certain unincorporated associations, sued in the name of their respective clerks, under authority given by statute, were liable for torts committed by their agents. *Ruck v. Williams*, 3 H. & N. 308 (1858); *Whitehouse v. Fellows* 10 C. B. (N. S.) 765 (1861). So, in the principal case, if the right to sue the trustees of a union were not restricted to actions relating to the society's property, there would have been no doubt as to the plaintiff's power to reach the funds of the union. But this provision of the statute authorizing the trustees to bring and defend suits in their names, seems, as is pointed out by A. L. SMITH, M. R., in delivering the unanimous opinion of the Court of Appeal, quite inconsistent with the theory that Parliament intended that unions might sue, or be subject to suit, in their registered names. "If this were so, what is the good of this section expressly enabling the trustees or other officers of the union to sue or be sued in respect of property?"

The Law Lords seem to have gone a great way to bring about a desired result, influenced, perhaps, by a sense of the intolerable difficulties ordinarily involved in bringing suit against such large bodies of individuals. Indeed, it is contended by an English writer that the language of the judges is so broad as to be applicable to the ordinary non-statutory, voluntary associations; *e. g.*, clubs. *Econ. Journal*, XI, 130, 447.

Lords Macnaghten and Lindley were of the opinion that the same result might have been reached without use of the registered name, and without the joinder of the several thousand members of the defendant union, by an action against several of the society's officers as representatives of the organization. This contention is based on the construction of the rule of Supreme Court regulating joinder of parties (order XVI, r. 9), adopted by the House of Lords in the recent case of *Duke of Bedford v. Ellis*, (1901) A. C. 1, where it was held that to justify a person suing in a representative character it is enough that he has a common interest with those whom he claims to represent.

VALIDITY OF STATUTES REGULATING THE SALE AND POSSESSION OF GAME.—The recent case of *In re Deininger*, 108 Fed. 623 (Oregon, April, 1901), raises again the question of the validity of statutes prohibiting the sale or possession of game of certain kinds.

Statutes of this kind may be divided into two classes, viz.: (1) those prohibiting the sale or possession of game for the purpose of transporting it beyond the limits of the State; (2) those prohibiting the sale or possession of game without regard to the purpose of the owner or to the place where it may have been captured. The validity of the first class of statutes was finally settled in the leading case of *Geer v. Conn.*, 161 U. S. 519 (1895). As to the second class the decisions of the State courts and of the lower Federal courts are irreconcilable and, as yet, the question has not been decided by the Supreme Court. The confusion upon this whole subject seems to be due to a failure to discriminate property in game from other kinds of property. The right to capture game seems always to have been subject to legislative control for the reason that all game is owned in common by all the people and held in trust for them by the state, so that while an individual may reduce it to possession, by that very act he subjects himself to the power of the legislature to regulate the use to which it may be put. 2 Blackstone's Com. 533, Chase's ed. 1890. In the absence of constitutional restrictions, each State may pass any law regulating the use and possession of game.

The validity of such a law, however, has been questioned on the ground that the owner is deprived of his property without "due process of law," and that it is a regulation of interstate commerce by the State. To the first objection the answer is that game "is not the subject of private ownership except in so far as the people may elect to make it so." *Ex parte Maier*, 103 Cal. 476, 483 (1894); *Geer v. Conn.*, *supra*; *State v. Rodman*, 58 Minn. 393 (1894). As to the second objection, it was said in the *Geer* case that the very notion of "common ownership imparts the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose," and that game cannot become the subject of interstate commerce except with the State's consent. It seems to be well settled that laws prohibiting the possession of game during the closed season, or at any time for the purpose of transporting it beyond the limits of the State, are valid.

Different considerations arise in the second class of statutes, an example of which is involved *In re Deininger*, *supra*. In that case the law was declared valid and held to apply to game lawfully captured outside the State. It does not necessarily follow that since a State, owing to the qualified ownership in game, may prohibit the exportation of game, it may prohibit the possession of it when brought from another State. It seems, however, that such statutes may be upheld as police regulations to protect domestic game, although interstate commerce be incidentally affected. In one of the leading State decisions on this point, it was said that the fact that the game "was either killed within the lawful period or brought

from another State where the killing was lawful " was no defense, and the statute was declared to be a valid police regulation. *Phelps v. Racey*, 60 N. Y. 10 (1875). The latter case is said to have been overruled by *People v. Buffalo Fish Co.*, 164 N. Y. 93 (1900), but the only point upon which a majority of the court agreed was that the legislature did not intend the statute to apply to foreign game. Portions of the opinion referring to *Phelps v. Racey* are *dicta*. A number of State decisions are in accord with *Phelps v. Racey*, *supra*. *Ex parte Maier*, *supra*; *State v. Rodman*, *supra*; *Magner v. People*, 97 Ill. 320 (1881); *State v. Farrell*, 23 Mo. App. 176 (1886).

There are very few decisions of Federal courts on this point. *In re Davenport*, 102 Fed. 540 (1900), a result was reached exactly opposed to that in *In re Deininger*, *supra*, the statute being declared unconstitutional as regulating interstate commerce. Though the question has never been squarely presented to the Supreme Court, it may reasonably be inferred that that court would uphold such statutes. In the *Geer* case, *supra*, it was said, p. 534: "The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play because by so doing interstate commerce may be remotely and indirectly effected." While this statement was made with reference to that particular case, the court referred with marked approval to *Ex parte Maier*, *supra*, and similar State decisions, and expressly disapproved of decisions to the contrary. It would seem that the prohibition against the importation of game is quite as great a protection to domestic game as the prohibition against exportation, since the cover for fraud and the illegal capture of game within the State is removed. This argument, however, was expressly rejected by three of the judges in *People v. Buffalo Fish Co.*, *supra*.

What bearing the "original package" decisions have upon this subject has never been decided. Indeed, the point seems never to have been raised, nor is it clear what would be an "original package" of game. A recent Act of Congress provides that all dead game, the importation of which into any state is prohibited, shall, upon arriving in such State, be "subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police power to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." U. S. Stat. at Large, Vol. 31, chap. 553, secs. 3 and 5, pp. 187-188, May, 1900. The validity and construction of this act have not yet been brought before the Supreme Court. What effect it will have upon this much confused subject remains to be seen.

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REVOCATION OF LICENSE TO WHARF OUT.—The Circuit Court for the Southern District of Alabama, has decided in the case of *Sullivan Timber Co. v. City of Mobile*, 110 Fed. 186 (Oct. 1901), that though a littoral owner has as such no right to wharf out, yet if, with the permission of the city, in which the title

to the bed of the river was vested, he does wharf out, such permission cannot be withdrawn, nor can the wharves be removed. The decision is based on the theory that when a license has been acted upon, and expenditures made in reliance thereon, it becomes irrevocable; and that one who permits another to make improvements upon his land without objection is estopped to bring ejectment.

At common law the title to submerged land was in the crown, and any erection thereon could be removed as a purpresture. The law in this country to-day is the same, save where it has been changed by statute or by usage, and in consequence the riparian owner has no right to wharf out. *Shively v. Bowlby*, 152 U. S. 1 (1894); *Revell v. People*, 177 Ill. 468 (1899). The case of *Yates v. Milwaukee*, 10 Wall. 497 (1870), has been regarded as holding otherwise; but any statements therein to that effect are no longer law, *Shively v. Brown*, *supra*, and in reading the case it should be noted that by the law of Wisconsin, riparian owners have been given the right to wharf out. *Yates v. Milwaukee*, *supra*, at p. 504. There is a usage in Alabama giving the littoral owner the same right, so the principal case could have been decided on this point without any discussion of irrevocable license and estoppel. In this latter respect the case is most unsatisfactory. If the plaintiff entered on the defendants' lands under a license, they acquired no interest or estate therein, for a license is but a privilege, revocable at the will of the licensor, and, "even where a consideration is paid, the right of revocation exists, where the terms of the agreement are not of such a nature as to make out a valid agreement which could be enforced in equity. Nor does the fact of the performance of the agreement render it effectual and valid unless the acts of performance are so clear, definite and certain in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a partial execution." *Cronkheit v. Cronkheit*, 94 N. Y. 106 (1884). There are some jurisdictions holding a contrary view where the license has been acted upon. These are, notably, Indiana, Iowa and Pennsylvania. *Snowden v. Wilas*, 19 Ind. 10 (1862); *Beatty v. Gregory*, 17 Ia. 109 (1864); *Baldwin v. Taylor*, 166 Pa. St. 507 (1895). The decisions are based upon the theory of the specific performance of contract, and an equitable estoppel. Of course, there is no contract in reality for the parties made none; nor is there any misrepresentation or fraud on the part of the licensor, whereon to base an estoppel. The only representation that the licensor made was an express one, permitting the licensee to enter and use the land presently. If the licensee desired any greater right, he should have been at pains to get it.

Nor do the cases bear out the holding of the court that, where an owner fails to object to the putting of improvements upon his land by another, without his consent, that other gains any rights against the owner. *Sherred v. Cisco*, 4 Sand. 480 (1850); *Day v. Caton*, 119 Mass. 513 (1876). *Kirk v. Hamilton*, 102 U. S.

68 (1880), cited by the court to support its decision is plainly distinguishable. There the owner made fraudulent representations to the defendant in ejectment, and was held estopped. Nor does the *Ry. Co. v. Jones*, 68 Ala. 49 (1880), likewise cited by the court, decide this point. The case simply holds that though a railroad company, before exercising its right of eminent domain, must make the owner compensation, the owner may waive this condition, and that if he knowingly permits the company to enter and lay its tracks without objection, he will be held to have so waived it.

But *in equity*, if one whose land has been improved seek relief, it will be granted to him only on his paying the value of the improvements made in good faith. *Smith v. Drake*, 8 C. E. Gr. 302 (N. J. 1873). And in some cases the party making the improvements has been given affirmative relief, by making the value of his improvements a lien upon the land. *Bright v. Boyd*, 1 Story, 478 (1840); *contra*, *O'Conner v. Hurley*, 147 Mass., 145 (1888).

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**RIPIARIAN RIGHTS AS PROPERTY IN NEW YORK.**—The nature of the interest which riparian proprietors possess has been the subject of much diversity of opinion. Private title to lands abutting on navigable streams ends at high water-mark, and the title to the tideway—the shore between high and low water-marks—vests in the State as trustee for the people. The owner of abutting property possesses those rights of access to the stream, which are commonly called riparian rights, to use and enjoy in proper subjection to the right of the public. In a recent case—*In re City of New York*, 61 N. E. 158 (N. Y. Oct. 1901)—it was held that riparian rights are property, and that when these were appropriated by the City of New York in the construction of a driveway, the owner is entitled to due compensation.

Riparian rights have not always been regarded as property, even in New York. The early case of *Lansing v. Smith*, 8 Cowen, 146 (1828), decided that they could be appropriated without any compensation to the abutting property owners, within the meaning of the seventh section of Article VII of the State Constitution, providing “that private property shall not be taken for public use without just compensation.” This doctrine was applied and extended by *Gould v. Ry. Co.* 6 N. Y. 522 (1852), which decided that the owner of property abutting on a navigable stream was entitled to no compensation for the appropriation of his riparian rights by a railroad company in the construction of its road. That riparian rights are *not* property may be regarded as the well-established law in New York at that date. This doctrine was not long acquiesced in, however, and was severely criticised by a long line of decisions from the *Story* case, 90 N. Y. 125 (1882), to *Kane v. R. R.*, 125 N. Y. 184 (1891). A later case—*Rumsey v. R. R.*, 133 N. Y. 79 (1892)—directly overruled the *Gould* case, and held that riparian rights are property. In the words of Mr. Justice MILLER, quoted with approval in that case, “This riparian right is property, and

though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired." But the case of *Lansing v. Smith*, *supra*, was distinguished and approved on the ground that there the riparian rights were appropriated by the State for the improvement of navigation. The effect of this decision was to recognize riparian rights, as property, when appropriated by a quasi-public corporation, but not when taken by the public for its use. This doctrine was cited with approval in *Sage v. Mayor*, 154 N. Y. 681 (1897). The Court in that case, while recognizing that due compensation must be made the owner whose riparian rights are appropriated by a railroad, allowed no compensation when they were taken by the State. The reasoning was that in every grant by the State, as trustee for the people, of land bounded by navigable rivers, there is an implied reservation of a right in the State to improve water fronts in the interest of navigation, without compensation to the grantee. These principles were recognized again *In re City of New York*, *supra*, but were confined within the narrow limits of the *Sage* case; that is, riparian rights cannot be appropriated, even by the public for any other purpose than the improvement of navigation, without due compensation to the owners.

Had the doctrine of the *Gould* case been followed to its logical conclusion, though this would have worked hardship and injustice, compensation must have been denied to abutting property owners for the loss of their riparian rights in all these cases. Such is the position of the United States Supreme Court and several of the State courts (see 1 COLUMBIA LAW REVIEW, 121). The *Gould* case and *Lansing v. Smith*, stand for the same principle, and when the former was overruled, the latter should have fallen too. Thus the *Rumsey* case introduced an anomaly into real property law; by its holding riparian rights *are* property for certain purposes within the meaning of that term in the Constitution, but for other purposes riparian rights are *not* considered property. In other words: Riparian rights, when appropriated by quasi public corporations or individuals, or by the State for the improvement of highways for vehicles are property, for which compensation must be given; when appropriated by the State for the improvement of highways for boats, riparian rights are not property and no compensation is due.

Nor can this result be justified on the theory of an implied reservation in the State's grants of the privilege of resuming these riparian rights without compensation. As a matter of fact, such a reservation cannot be inferred from the content of these grants, and the courts cannot read it into the grants, on the ground of preventing hardship to one of the parties, for in practice to do so works hardship and injustice to the weaker party. All effort to reconcile these elements of inconsistency proving futile, riparian rights must still be regarded as occupying an anomalous position in New York law.

## RECENT DECISIONS.

AGENCY—RATIFICATION—UNDISCLOSED PRINCIPAL. *Held*, a contract made by one in his own name, but intending it to be for another, without authority from that other, cannot be ratified. *Keighley Maxted & Co. v. Durant* (1901) A. C. 240. See NOTES, p. 544.

CARRIERS—TICKETS—FALSE IMPRISONMENT. The plaintiff presented an unused portion of an excursion ticket, reading "New York to Newark," for passage from Newark to New York. It was refused by the defendant's conductor. The plaintiff declined to pay his fare in cash, and left the ticket in the car. The conductor then caused the plaintiff's arrest. The plaintiff later brought action for assault and battery and false imprisonment. The defendant supported the conductor's action under the statute (Gen. St., p. 2668), providing for the apprehension of those attempting railroad travel "with intent to avoid payment thereof." The plaintiff denied such intent, and offered to prove a custom of the railroad to accept ticket as offered. *Held*, proof of custom, modifying conditions of ticket, should have been admitted as evidence tending to show that the plaintiff might have relied on such custom and lacked intent to avoid payment of fare. *Tiedy v. Erie R. Co.*, 49 Atl. 427 (N. J. June, 1901).

The statute had previously been before the court in *Harris v. Central R. R. Co.*, 58 N. J. L. 282 (1895). It was there declared penal, construed strictly and "intent to avoid payment" held necessary to recovery under it.

Tickets are usually merely receipts or tokens to enable carriers' agents to recognize the bearers as persons entitled to be dealt with in certain ways. Generally they are not contracts. Parol evidence may modify them. *Quimby v. Vanderbilt*, 17 N. Y. 306 (1858); *Rawson v. P. R. R. Co.*, 48 N. Y. 212 (1872); *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 234; *Runyan v. C. R. R. Co.*, 61 N. J. L. 537 (1898). Contracts may be proved independently of the terms of the ordinary ticket. Thompson on Carriers of Passengers, 65. Such evidence is generally inadmissible, where the ticket is a so-called "contract" ticket, especially when signed by the passenger. *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553 (1891); Lawson on Usages and Customs, 228. Evidence may be introduced to show that, by custom, a common carrier includes in his liability more than is strictly admissible at common law. *Kemp v. Coughtry*, 11 Johns. 107 (1814); *Harrington v. M. Shane*, 2 Watts 443 (1834).

CONSTITUTIONAL LAW—"DUE PROCESS" IN THE NEW YORK ANTI-MONOPOLY LAW. Laws of 1899, c. 690, providing that, when the attorney-general shall have determined to bring an action for violation of the prohibition against monopolies in commodities of common use, any justice of the Supreme Court to whom the application is made shall grant an order for witnesses to be examined and to produce records relating thereto, is constitutional. *Matter of Davies*, 168 N. Y. 89; 61 N. E. 118 (Oct. 1901).

The validity of such statutes as this has ordinarily been objected to as the result of the refusal of a witness to answer questions which he thought tended to incriminate him. *Counselman v. Hitchcock*, 142 U. S. 547 (1890). But, since the insertion of an express provision that that fact should not excuse a witness from testifying, it being also provided that testimony so obtained should never be used against him, statutes in this form have been upheld by the Supreme Court. *Brown v. Walker*, 161 U. S. 591 (1895). In New York they have never been open to this objection since the decision in *People v. Kelly*, 24 N. Y. 74 (1861). It seems very doubtful whether any legislative assurance against future prosecution altogether satisfies the constitutional requirement that no person shall "be compelled, in any criminal case, to be a witness against himself," but

the point must be regarded as settled. Aside from that, there is little reason to question the validity of the procedure provided by this act. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447 (1893). A Justice of the Supreme Court, under it, must perform the judicial function of determining whether the Attorney-General's application is properly made; and the Court necessarily has power to examine witnesses in an action itself, or through a referee, in the course of a reasonable inquiry, in pursuance of express legislative authority.

CONSTITUTIONAL LAW—NEW YORK TICKET-SCALPING LAWS. *Held*, an act of the legislature (Laws of 1901, c. 639) prohibiting the sale of passenger tickets except by the authorized agents of the company over whose road the ticket reads, is unconstitutional. *People ex rel. Fleischmann v. Caldwell*, 71 N. Y. Supp. 654 (App. Div. July, 1901).

Laws of 1897, c. 506, is substantially the same as the act involved in the principal case, except that by the former act the authorized agent of one company might purchase tickets for its patrons from the authorized agents of another company. This act was declared unconstitutional in *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116 (1898), on the ground that it infringed the right of the citizen to engage in a lawful business. N. Y. State Cons., Art. 1, Sec. 1. Upon that case the decision in the principal case is based. It seems clear that each company need only constitute the agents of other companies its own agents and all the objections to the previous act may be raised to this later one. Upon the authority of the *Tyroler* case, *supra*, the principal case seems to be correct. It is interesting to note, however, that the view of the New York courts in these cases is opposed to that of the courts of many other States where similar acts have been passed. *Com. v. Keary*, 48 Atl. 472 (Penn. 1901); *Fry v. State*, 63 Ind. 552 (1878); *Burdick v. People*, 149 Ill. 600 (1894); *Railroad v. McConnell*, 82 Fed. 65 (C. C. Tenn. 1897).

CONSTITUTIONAL LAW—POLICE POWER—GAME LAWS. A State statute prohibiting the possession and sale of game of certain kinds during the closed season was *held* to apply game lawfully captured outside the State and not to violate the Federal Constitution. *In re Deininger*, 108 Fed. 623 (Oreg., April, 1901). See NOTES, p. 548.

CONSTITUTIONAL LAW—VESTED RIGHTS. A California statute created a fund for the payment of \$1,000 to the widows of policemen. *Held*, on the death of a policeman his widow had a vested right to \$1,000, which the repeal of the statute could not affect. *Kavanagh v. Board of Police Pension Fund Com'rs*, 66 Pac. 36 (Cal. Aug. 1901).

There is here no contract between the State and the plaintiff. Were such the case her right to recover would be clear. *Steamship Co. v. Jolliffe*, 2 Wall. 450 (U. S. 1860); *Salt Co. v. East Saginaw*, 13 Wall. 373 (U. S. 1871). And where the right of action does not grow out of a contract, but is dependent upon a statute, it ceases and determines with the statute upon which it depends. *U. S. v. Morris*, 10 Wheaton, 246 (U. S. 1825); *Butler v. Pennsylvania*, 10 How. 402 (U. S. 1850); *Conner v. Mayor of New York*, 2 Sand. 355 (N. Y. 1849); *People v. Roper*, 35 N. Y. 629 (1866).

The opinion cites but one authority in support of its position, *Pennie v. Reis*, 132 U. S. 471 (1889). That case did not involve the point here under discussion, though there is a *dictum* in the opinion supporting the decision in the principal case.

CONTRACTS—DEFENSE OF MAINTENANCE AND CHAMPERTY. An agreement by one not a lawyer to assist infant heirs, to whom he was not related, in contesting a will in consideration of receiving a sum equal to a certain part of what might be recovered, was *held* void under the common law rule against maintenance. *Lynn v. Moss*, 62 S. W. 712 (Ky. May, 1901).

It is generally held that the reasons upon which the ancient doctrine of maintenance rested have never existed in the United States. *Schomp v. Schenck*, 40 N. J. L. 195 (1878); *Richardson v. Rowland*, 40 Conn.



565 (1873); *Wright v. Meek*, 3 G. Greene, 472 (Ia. 1852). The point was squarely decided in New York in *Sedgwick v. Staunton*, 14 N. Y. 289 (1856), where it was held that "not a vestige of the law of maintenance, including that of champerty, now remains in this State, except what is contained in the Revised Statutes." Approved in *Fowler v. Callan*, 102 N. Y. 395 (1886). The doctrine of the principal case has, however, been upheld recently in Minnesota. *Gammons v. Gulbrauson*, 80 N. W. 779 (Minn. 1899).

**CORPORATIONS—REVIVAL OF ACTION FOR LIBEL AGAINST TRUSTEES AFTER DISSOLUTION OF CORPORATION.** Where an action for libel against a corporation had abated by reason of the termination of the existence of the corporation by the limitation in its charter, *held*, such action might be revived against the directors of the corporation at the time of its dissolution, as trustees. *Shayne v. Evening Post Publishing Co.*, 168 N. Y. 70 (Oct. 1901), 61 N. E. 115. See NOTES, p. 542.

**CRIMINAL LAW—CONTEMPT—JURISDICTION.** An attorney who was brought into court under an illegal arrest, protested angrily against his arrest and refused to obey orders of the court, was adjudged guilty of contempt. On *habeas corpus* proceedings it was *held*, since the writ of attachment was void, the Court at no time rightfully obtained jurisdiction over his person and the mere fact that he may have exhibited anger or indignation at the unwarranted arrest did not constitute contempt. *Ex parte Duncan*, 62 S. W. 758 (Tex. April, 1901).

An attorney as an officer of the court is always within its jurisdiction. Bishop, Crim. Law, II., § 254. Moreover, a court has the right to maintain order and uphold its dignity, even in a case which must ultimately be dismissed for want of jurisdiction. *Ex parte Stickney et al.*, 40 Ala. 168 (1866). In such a case neither a party nor an officer nor any other person can safely insult the court or resist its order. *Passmore Williamson's Case*, 26 Pa. St. 9 (1855); *People v. McKane*, 78 Hun 154, 161 (1894). As was pointed out by HENDERSON, J., in dissenting from the decision in the principle case, "it does not matter how he was brought into court. The court then had jurisdiction of him, and he was bound to be respectful to the court."

**CRIMINAL LAW—HOMICIDE—REDUCTION OF CRIME.** The defendant finding his wife in company with the deceased under circumstances that gave rise to the belief that adultery was being committed, shot and killed her supposed paramour. *Held*, belief by the husband that his wife was committing adultery, provided such belief was reasonable, was sufficient provocation to reduce the crime of killing her supposed paramour from murder to manslaughter. *State v. Yans*, 50 Atl. 37 (Conn. Sept. 1901).

This decision is to be supported. The test of provocation is whether the conduct of the party killed was such as the law would deem sufficient to excite passions beyond control. Bishop, New Criminal Law, vol. II. § 710; *Preston v. State*, 25 Miss. 383. The law adjudges adultery to be sufficient provocation to reduce the killing of a wife's paramour by the husband from murder to manslaughter, on the ground that the wife's adultery is calculated to excite the husband to anger beyond control. Bishop, *supra*; *Com. v. Whittier*, 2 Brewster, 388 (1868). As adultery produces such madness as to remove the peculiar state of mind necessary in murder, it inevitably follows that belief—where circumstances justify such belief—that adultery is being committed is likewise calculated to incite passion beyond control. *Price v. State*, 18 Tex. App. 474 (1885); *State v. Pratt*, Houston Del. Rep. Cr. 249 (1867). It is immaterial to the state of mind at the moment of killing whether this reasonable belief is subsequently proved false. The assenting opinion is supported by an Alabama decision, *State v. Hoaks*, 13 Southern 767 (Ala., 1893).

**DOMESTIC RELATIONS—HUSBAND AND WIFE—AGREEMENT FOR SEPARATION.** An agreement to separate was made by husband and wife by which, in addition to living apart, they agreed to relinquish the rights each possessed

in the property of the other. After the wife's death, the husband, the plaintiff, sought to recover his interest in her property. *Held*, the agreement for separation was illegal and entire and a collateral undertaking to relinquish property rights was therefore void, the illegality tainting the entire agreement. *Foot v. Nickerson*, 48 Atl. 1088 (N. H. March, 1901).

This decision is in opposition to the modern English rule which enforces agreements for separation as well as collateral undertakings, as separate maintenance of wife, custody of child, etc. Bishop, *Marriage and Divorce*, Vol. I, § 1264; *Besant v. Wood*, 12 Ch. D. 605 (1879). It is also opposed to the weight of American authority. The general doctrine in America, following the old English rule, refuses to recognize as valid agreements for separation made with or without trustees—*Tourney v. Sinclair*, 3 How. 324 (Miss. 1828); *McKenna v. Phillips*, 6 Wharton, 571 (1828)—but will enforce collateral undertakings in such agreements. *Thomas v. Brown*, 10 Ohio St. (1859); *Wallace v. Basset*, 41 Barb. 92 (1863); *Pettit v. Pettit*, 107 N. Y. 677 (1887).

**DOMESTIC RELATIONS—HUSBAND AND WIFE—PRESUMPTION OF TRUST.** Where a married woman, who by statute may contract as sole even with her husband, gave her husband her marriage portion, which he used in his business, *held*, a presumption of a trust in her favor arose and she might prove her claim before creditors in absence of fraud. *In re Nieman*, 109 Fed. 113 (Wis. May, 1901).

The rule of the principal case has long obtained in courts of equity. 2 Lewin Trusts 778; Story Eq. Juris. § 1395; *Jones v. Davenport*, 13 Atl. 652 (N. J. Eq. 1888). As long as the common law disabilities of coverture continued, courts of law held that the presumption was in favor of a gift. *Jacobs v. Hesler*, 113 Mass. 157 (1873). But the married woman's acts have been generally construed in accordance with the decision in the principal case. *Bergey's Appeal*, 60 Pa. St. 408 (1869); *Stickney v. Stickney*, 131 U. S. 227 (1889); *Parrell v. Palmer*, 35 N. E. 713 (Ind. 1893). The effect of these decisions is only to apply the same presumption where the parties are husband and wife, that would exist were the money deposited under similar circumstances with a third party. *Chadbourne v. Williams et al.*, 47 N. W. 812 (Minn. 1891).

**EVIDENCE—ADMISSIONS.** Statements were made in the presence of the accused by his brother at the time of arrest. *Held*, these, together with the remarks of the officer, were admissible, as well as the fact that the accused did not deny or correct such statements. *People v. Wennerholm*, 60 N. E. 259 (N. Y. 1901).

This represents a line of cases much discussed and difficult of decision, an exception to the hearsay rule of evidence. In the early cases the courts proceed with extreme caution and hesitate to accept mere silence as an admission. *Child v. Grace*, 2 C. & P. 193; *Carter v. Buchannon*, 3 Ga. 513 (1847); *Rolfe v. Rolfe*, 10 Ga. 143 (1851). The fact of no reply where a direct accusation of crime is made was admitted in *Puett v. Beard*, 86 Ind. 104 (1882).

The Court in *People v. Koerner*, 154 N. Y. 355 (1897), admitted such evidence where the accused had full liberty to make answer and comprehended the effect of the words spoken, and under the circumstances would naturally have replied had he not acquiesced.

The principal case is distinguishable from *People v. Kennedy*, 164 N. Y. 449 (1900), where this kind of evidence was not admitted, and is further to be distinguished from cases like *Perry v. Johnston*, 59 Ala. 648 (1877), where the statements were made by strangers, with whom the accused had no connection.

**EVIDENCE—ADMISSIBILITY OF CONFESSION—THREAT BY OFFICERS.** Where the defendant, being indicted for larceny, was told by the officer who had arrested him, "If you have stolen the cotton, it will be better for you to tell the truth about it," and defendant confessed, *held*, such confession was voluntary and admissible in evidence against the defendant. *Huffman v. State*, 30 So. 394 (Ala. May, 1901).

To invalidate a confession it must be given in consequence of an inducement, threat or promise made by a person in authority, the reason being that it would not be safe to accept a statement made under any influence or fear. *Regina v. Baldry*, 2 Den. C. C. 430 (1852). Consequently, where a confession is made in reliance on some promised advantage or plainly expressed threat, no question can arise. But when we reach a case where the party accused is told that it would be better to tell the truth, we find conflicting decisions. One line of cases, followed in the principal case, holds that under such circumstances no advantage or threat is implied. In other words, that it is a matter of perfect indifference whether or not the prisoner confesses. *King v. State*, 40 Ala. 314 (1867). This, however, assumes that the prisoner will look at the matter in a similar way, whereas, the logical conclusion on his part is that "it will be better for you" contains a veiled threat. Such reasoning looks to the state of mind of the party extorting the confession and is a poor guide. The other line of cases holds that a confession made under circumstances on all fours with the principal case is not voluntary, and hence inadmissible. The confession is to be excluded, not because it was improperly obtained, but on the ground that it is unreliable because of the difficulty of estimating the degree of influence produced on the prisoner. Moreover it is necessary to put some check on the zeal of officers who try to secure the conviction of a prisoner, and the slightest evidence of inducements or threats on the part of the party securing the confession should invalidate such confession. *People v. Phillips*, 42 N. Y. 200 (1870). In the Phillips case the officer told the prisoner that he had better confess, and, as was said by FOSTER, J., p. 203, " \* \* \* the language of the officer to the prisoner, \* \* \* which led to his confessions came clearly within the rule and were inducements for the confessions, which relieve them from being voluntary." A confession obtained by similar means in the case of *People v. Thompson*, 84 Cal. 598 (1890), was excluded.

It is of interest to note that § 395 of the New York Code of Criminal Procedure providing that "A confession of a defendant \* \* \* can be given in evidence against him, unless made under the influence of fear produced by threats or, unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor," has in no way changed the law on this subject, *People v. Mondon*, 103 N. Y. 211 (1886), at p. 219, and that the rule as laid down in the Phillips case, *supra*, is still the law in this State.

**MORTGAGES—FORECLOSURE—REDEMPTION.** Testatrix devised two lots, covered by the same mortgage, lot 10 to A, lot 11 to the defendant; but charged the payment of the whole mortgage debt on lot 10. The mortgage was foreclosed, the will and the condition thereof appearing in the bill. The plaintiff, a judgment creditor of A, redeemed both lots. *Held*, he acquired no title to lot 11, for he had no right to redeem it, not being a judgment creditor of the defendant; and, since his equities were those of his judgment debtor, he had no claim to contribution from the defendant. *Huber v. Hess*, 61 N. E. 61 (Ill. June, 1901).

The plaintiff's only right to redeem the premises in question was founded on the Illinois statute giving the judgment creditor such right. His title was derived from A. A was bound in law, if the payment of the whole mortgage claim were a condition of the devise to her, and in equity if it were a charge on the estate, to pay the whole mortgage claim. If the devise was on condition, the plaintiff took subject to that condition, *Ed.*; was bound to pay the whole mortgage debt. 4 Kent's Com. 126, 13th ed., *Hodgeboom v. Hall*, 24 Wend. 146 (1840), or forfeit the estate. If the devise contained an equitable charge, the plaintiff took with notice thereof, purchasing at a judicial sale, *Lessee of Smith v. McCann*, 24 How. 398 (U. S. 1860); *Stith v. Lookabill*, 71 N. C. 25 (1874), and is, therefore, subject to the charge and liable in equity to pay the whole mortgage debt. *Gardner v. Gardner*, 12 Wheat. 498 (U. S. 1827); *Taft v. Morse*, 4 Met. 523 (Mass. 1842). In neither case has he any equitable claim to contribution against the defendant.

**NEGOTIABLE INSTRUMENTS—CONFLICT OF LAWS.** A married woman domiciled in New Jersey drew a note to her husband's order. He carried it into New York and there negotiated it. *Held*, the indorsee suing in New Jersey could recover in a suit against the maker. *Thompson v. Taylor*, 49 Atl. 544 (N. J. June, 1901).

A contract is governed by the *lex loci contractus*, not by the *lex fori*, and this has been held to apply to contracts of married women made outside of the State of their domicile, where such contracts are void. *Milliken v. Pratt*, 125 Mass. 374 (1878). The only doubt in the present case is whether the defendant ever made a contract in New York.

Touching this point, it has been held in many cases that where a note is made in one State for the purpose of being negotiated in another, it comes into legal existence when and where negotiated and is thereafter enforceable, even though, had such negotiation not occurred, it would have been void in the jurisdiction where it was actually drawn. *Campbell v. Nichols*, 33 N. J. Law, 81 (1868). How far such intention was manifested in the principal case is not shown in the report. Whether the mere absence of a contrary intention is sufficient, is a point on which there seems to be little direct authority. Considering the reason for the general rule, viz., to strengthen the validity of negotiable instruments in the hands of holders for value, the question may be answered in the affirmative as being a probable and logical development of the general doctrine.

**NEGOTIABLE INSTRUMENTS—TIME OF PAYMENT.** The plaintiff sued on a note promising payment "within one year after date." *Held*, this stated the time of payment with certainty sufficient to render it a valid, negotiable promissory note. *Leader v. Plante*, 50 Atl. 54 (Me. July, 1901).

This decision seems sound, and is supported in many jurisdictions. *Matteson v. Marks*, 31 Mich. 423 (1875); *Curtis v. Horn*, 58 N. H. 504 (1878). The Massachusetts doctrine, though originally the same, *Cota v. Buck*, 7 Metc. 588 (1844), is now different. In *Way v. Smith*, 111 Mass. 523 (1873), such provision was held to render the "contract uncertain and contingent, both as to the time of payment and amount to be paid." It seems clear that business usage supports the general rule. The negotiability of the note is no more impaired than by a provision to pay on demand. There is sufficient certainty if the time of payment is certain to come.

**REAL PROPERTY—LATERAL SUPPORT OF SUBMERGED LAND.** The defendant, the owner of a pier extending into New York Bay, was, by grant from the State, given adjoining land, lying under the water. Upon dredging this land, in order to build a dry dock, the loose soil and mud on which the neighboring pier of the plaintiff was erected, slipped and shifted, causing damage to the pier. *Held*, the plaintiff could not recover because the right to lateral support did not apply to lands lying under water. *White v. Nassau Trust Co.*, 61 N. E. 169 (N. Y. Oct. 1901).

This decision, to the effect that the rule as to lateral support does not apply to lands covered by water, while novel, seems to be reasonable. As pointed out by the Court, the soil at the bottom of the bay is loose and liable to shift owing to the flow of the tides. Under such conditions the rule would be harmful, in that it would interfere with improvements made in the interests of the public. But the Court, in deciding the case, went even further, for it held that plaintiff could not recover even if he were entitled to lateral support. It reached this result on the ground that the weight of the plaintiff's pier required an increased amount of lateral support. If this had been the case the decision of the Court would have been correct, *Lasala v. Holbrook*, 4 Paige, 169 (1833); *Gilmore v. Driscoll*, 122 Mass. 201 (1877), but the Appellate Division found, *White v. Tebo*, 43 App. Div. 418, at p. 421, that the plaintiff's pier did not increase the pressure upon the defendant's soil—a finding of fact which was not subject to review by the Court of Appeals. If, as was the case, the pier did not increase the pressure on the defendant's soil, the case could be sustained by the application of the English doctrine, that where the injury to the soil is inappreciable no recovery can be had for damage to

the structures upon it, since the right to lateral support is relative, and the infringement of it without appreciable damage does not give rise to a cause of action. *Smith v. Thackerah*, L. R. 1 C. P. 564 (1866). In the principal case, the damage to the soil in its natural state was inappreciable, and in view of that fact plaintiff was not entitled to recover damages.

**REAL PROPERTY—EVICTION—ABANDONMENT BY LESSEE.** Where the defendant was lessee of certain premises of the plaintiff and abandoned the same within her term and the plaintiff relet a portion of the premises to a third party, *held*, this reletting did not prevent the plaintiff from recovering from the defendant rent for that portion of the premises not relet. *Dolton v. State*, 49 Atl. 679 (N. J. June, 1901).

To reach the result obtained in this case certain jurisdictions have refused to admit that such a reletting is an eviction. It is said to be a reletting "for and on account of" the tenant, who, accordingly, is entitled to a credit for the amount so obtained. *Brown v. Cairns*, 77 N. W. 478 (Ia. 1898). This construction of such a reletting is wrong in principle, if it does not actually rest on a violation of the Statute of Frauds, *Smith v. Kerr*, 108 N. Y. 31 (1888), although the conclusion reached upon it is logical.

In the present case the Court admits that the action of the plaintiff was, "in a legal sense, an eviction," but insists that, as the eviction was "constructive merely," it should impose upon the plaintiff "no penalty other than that of crediting the tenant with the sum so earned by the property during the term." This is a novel theory. Why a tenant may avoid liability for rent by showing that certain acts of his landlord have amounted constructively to an eviction—that is, to an essential term of the lease—is reasonably evident. *Dyett v. Pendleton*, 8 Cowen, 727 (1826); *Silber v. Larkin*, 68 N. W. 406 (Wis. 1896). But why a landlord may still be allowed to hold his tenant for rent when his act confessedly constitutes even a constructive eviction is obscure. *Lawrence v. French*, 25 Wend. 443 (1841); *Christopher v. Austin*, 11 N. Y. 216 (1854); *Gray v. Kaufmann Dairy Co.*, 162 N. Y. 388 (1900).

**REAL PROPERTY—REMAINDERS—"SURVIVORSHIP."** Where there was a devise to A for life and at the time of her decease to her surviving children, their heirs and assigns, *held*, the words of survivorship referred to the testator's death and the children acquired a vested remainder. *In re Twaddell*, 110 Fed. 145 (Pa. Sep. 1901).

It was a settled construction of the early law that words of survivorship, even where the gift was not immediate, applied to the testators' death, *Wilson v. Bayly*, 3 Bro. P. C. 195 (1760), on the ground that there was no other mode of reconciling such language with words of severance creating a tenancy in common and that the law favored vesting of estates. This technical rule, opposed to the ordinary meaning of words, was variously limited. *Hill v. Rockingham Bank*, 44 N. H. 567 (1863), and cases there cited. In *Cripps v. Wolcott*, 4 Madd. 11 (1819), the words were construed to refer to the time of distribution, and though this decision was long held to apply to personalty, the law was similarly fixed in regard to realty in *Matter of Greyson's Estate*, 2 D. J. & S. 428 (1864), overruling *Doe v. Prigg*, 8 B. & Cr. 231 (1828), where the devise was to a class as in the principal case. The early rule was adopted in New York.

**REAL PROPERTY—RIGHT TO WHARF OUT—LICENSE.** The plaintiff, a riparian owner, built wharves extending to the navigable part of the Mobile River, the City of Mobile having knowledge of the fact and regulating the manner in which such wharves should be built. *Held*, the City of Mobile could assert no claim to the submerged land whereon the wharves were built, so as to dispossess the plaintiff. *Sullivan Timber Co. v. City of Mobile*, 110 Fed. 186 (Ala. Oct. 1901). See NOTES, p. 547.

**REAL PROPERTY—RIPARIAN RIGHTS—COMPENSATION.** The plaintiff, an owner of uplands on the Harlem River, was possessed of certain riparian rights in a tideway of the river, which the City of New York filled and converted to the use of the public as a driveway. The plaintiff sought

to recover compensation for the loss of his riparian rights. *Held*, though the city might appropriate the tideway for the purpose of improving navigation, without compensation being made to the owner, for the loss of his rights, there must be compensation when the tideway was appropriated by the city for other purposes. *In re City of New York*, 61 N. E. 158 (N. Y. Oct. 1901). See NOTES, p. 561.

**REAL PROPERTY—WATER RIGHTS—PRESCRIPTION AGAINST MUNICIPAL CORPORATION.** The defendant was the borough in which the plaintiff resided. The plaintiff owned premises supplied with water from a pipe connected with the defendants' system of water works. Claiming a right to the free use of such water, the plaintiff, under such claim, used it notoriously, peaceably, and continuously for a period of more than twenty-one years. *Held*, the plaintiff acquired a prescriptive right to the free use of such water. *Kearney v. Borough of Westchester*, 49 Atl. 227 (Pa. May, 1901).

The decision is correct. A right to use water from the pipe of a water supply company may become appurtenant to the land supplied and pass as such, *Coolidge v. Hugar*, 43 Vt. 9 (1870), and it is fundamental that appurtenant rights may be acquired by prescription.

The doctrine that the Statute of Limitations does not run against the State, has no application to a municipal corporation engaged in a private business in which the public as such has no rights. *Evans v. Erie County*, 66 Pa. 222 (1870).

**REAL PROPERTY—WATERCOURSES—DRAINAGE.** The defendant drained water from his swamp into a river running through his land, thereby flooding the property of the plaintiff, an adjoining riparian owner.

In a suit to recover damages for the injury, *held*, the defendant's common law right of drainage was not limited to the capacity of the natural outlet. *Mixell v. McGowan*, 39 S. E. 729 (N. C. Oct. 1901).

According to a well-settled rule of law, the owner of land abutting on a stream may, by draining into it, increase or accelerate its flow, provided the volume of water is not increased beyond the natural capacity of the stream to discharge it. *McCormick v. Horan*, 81 N. Y. 86 (1880); *Wheeler v. Worcester*, 10 Allen 591 (1865). In the principal case the Court admits that the decision is in conflict with the weight of authority, but contends that its holding is rendered necessary by the peculiar conditions which exist within the jurisdiction—the vast area of uncultivated swamp lands. Hence the reaffirmance of the rule laid down in *Jenkins v. Railroad*, 110 N. C. 438 (1892); *Mixell v. McGowan*, 120 N. C. 134 (1897).

**STATUTES—DEPOSITION—COMPETENCY OF EVIDENCE.** The defendant, being sued by the plaintiff for the balance of an open account, interposed a counterclaim, to prove which he introduced at the trial the deposition of a witness taken out of the State under §§ 887-892 of the Code of Civil Procedure. In this deposition the witness gave "opinions and conclusions." The plaintiff duly excepted to the admission of this evidence, but the trial judge overruled the objection on the ground that, though the evidence would not have been competent had the witness been on the stand, it was admissible because the plaintiff had waived his right to object at the trial by his failure either to object to the interrogatories or to move to suppress the commission. Upon appeal it was *held*, § 911 of the Code of Civil Procedure provided that the evidence contained in such a deposition is open to the same objections as if the witness himself were on the stand, and, therefore, the ruling of the trial judge was error. *Wanamaker v. Megraw*, 61 N. E. 112 (N. Y. Oct. 1901).

In view of the plain language of § 911, it would seem that the decision is clearly right. Three of the seven judges, however, dissented, without giving their reasons. For interpretations of similar statutes in other states, see *Burton v. Baldwin*, 61 Ia. 283 (1883); *The Central Railroad and Banking Co. v. Gamble*, 77 Ga. 584 (1886); *Moody v. A. G. S. R. Co.*, 99 Ala. 553 (1892).

**STATUTES—ENGLISH TRADE UNION ACTS—RIGHT TO SUE TRADE UNION IN REGISTERED NAME.**—The Trade Union Acts, 1871 and 1876, legalize

the formation of unions and, among other things, provide for their registration and for the vesting of their property in trustees, who are authorized to bring or defend any suits relating to such property. In an action against the defendant union in its registered name and against several of its officers for unlawful picketing, an injunction and damages were demanded. The society moved to be dismissed from the action on the ground that it could not be sued in its registered name. *Held*, the action was properly brought. *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A. C. 426. See NOTES, p. 546.

STATUTES—N. Y. LAWS OF 1899, c. 700. The N. Y. Laws of 1899, c. 700, provides, in substance, for the payment, by issue of city or county revenue bonds, of the reasonable expenses incurred by a city or county official in defending himself successfully in any action to remove him from office for a violation of official duties. The plaintiff, a police officer of the defendant city, having defended himself successfully in such an action sought reimbursement, under this act, from the defendant for expenses so incurred. *Held*, the act, in so far as it attempted to give the plaintiff the relief sought, was in violation of Art. 8, Sec. 10 of the N. Y. Constitution, which provides that "no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual \* \* \* nor shall any such county, city, \* \* \* be allowed to incur any indebtedness except for county, city \* \* \* purposes," and was therefore void. *Chapman v. City of New York*, 61 N. E. 108 (N. Y. Oct. 1901).

That the act in question sought to compel the defendant city to incur an indebtedness for other than city purposes is manifest. The decision is of interest because it determines that the N. Y. Constitution embodies the common law rule that "when a citizen accepts a public office he assumes the risk of defending himself against unfounded accusations at his own expense."

STATUTES—PENAL PROVISIONS. The plaintiff sued under a statute allowing the owner of land to recover treble damages for the wilful cutting of timber. The defendant pleaded in bar *Gen. St. Conn., 1888, § 1379*, which provides that no suit for forfeiture on any penal statute shall be brought after one year from the commission of the offense. *Held*, such a statute was not penal, and the limiting statute did not run against the plaintiff. *Plumb v. Griffin*, 50 Atl. 1 (Conn. Sept. 1901).

The Court must be understood as holding squarely that no statutes are strictly and properly penal except those giving a right of action to the State, and as excluding from that definition those statutes which merely give the injured party a right to increased damages in a private action against the wrongdoer. The cases cited sufficiently support the decision. *Ross v. Bruce*, 1 Day, 100 (1803); *Le Forest v. Tolman*, 117 Mass. 109 (1875).

Some apparently contrary holdings are explained by the fact that the courts in dealing with cases under statutes, giving such right to increased damages, have referred to them loosely as "penal statutes." In no case, however, has such language been a part of or necessary to the decision.

TRUSTS—DUTY TO KEEP TRUST FUNDS SEPARATE—INTEREST. Upon a sale of land in 1867 the defendants' testator accepted from the vendee the purchase money, and agreed to hold it for, and to pay it to the plaintiff when the vendee's title became perfect. The testator at once deposited the money in a bank to his own account and mingled it with his own funds; the defendants have in like manner kept it in the bank to their own account. From 1867 to the date of this action both his and their bank accounts have occasionally fallen below the amount of the purchase money, but for all that appears to the contrary, either he or they could have made good the whole sum upon demand. In 1888 the vendee's title became perfect, but the defendants refused to pay over the purchase money at that time and have since refused to do so. *Held*, there was no breach of trust until 1888, and that, therefore, the plaintiff

was entitled to interest on the purchase money from this date only. *Mathewson v. Davis et al.*, 61 N. E. 68 (Ill. June, 1901).

The court bases its decision on two facts: First, that the plaintiff did not prove that the testator or the defendants were at any time financially unable "to meet the obligation," and, secondly, that the original parties to the trust never intended that interest should be paid. The first seems immaterial; to argue that the plaintiff did not prove a breach of trust, before the flagrant breach in 1888, because he did not prove that the testator was, or the defendants were, at any time financially unable to pay over an amount equal to the trust fund, is irrelevant. As to the second, it seems sufficient to say that the original parties never expected that the testator or the defendants would commit a breach of trust by destroying the trust *res* in mingling it with their own funds and in using it for their own profit. That both he and they did this is evident. The decision is wrong in principle and is opposed to the weight of authority. See Lewin's Law of Trusts (9th Ed.), pp. 315, 376; Pomeroy's Equity Jurisprudence (2d Ed.), § 1076.

**TRUSTS—FOLLOWING TRUST FUNDS:** The plaintiff gave money for a particular purpose to S, her agent. S gave the money in the course of an illegal transaction to the defendant, who later returned part of it. *Held*, S was a trustee. Since the defendant had not received the money innocently and for value he was liable to the plaintiff even for that part returned to S. *Grain Exchange v. Bendinger*, 109 Fed. 926 (C. C. A. June, 1901).

The plaintiff could claim the property in the hands of the defendant, he having acquired title subject to the plaintiff's equity, because of the illegality of the transaction. Nor need the *cestui que trust* point out the specific *res*, if the proceeds have come into his hands so as to increase his assets. *People v. Danesville Bank*, 39 Hun, 187 (1886); 2 Perry on Trusts, 5th edition, § 838.

The fact of repayment of part of the sum of money to the agent does not alter the case. If the return was a payment of a debt, the assets of the defendant were none the less increased. And if the return was not in payment of a debt, the defendant, by the receipt of the money, had been constituted a trustee for the plaintiff and was liable to him in an action of debt for the whole claim. Hill on Trustees, p. 518.

**TRUSTS—SALE OF RES BY ORDER OF COURT—PURCHASE BY TRUSTEE.** Where, in a suit for partition of certain lands, the plaintiff had brought action both as an individual and as a trustee, against the *cestui* and, at the sale which was decreed, the plaintiff bought in the land, sale being confirmed by the court, *held*, the trustee acquired a valid title, as the court in affirming the sale approved of the purchase by the trustee. *Corbin v. Baker*, 60 N. E. 332 (N. Y. May, 1901).

Ordinarily, where a trustee becomes the purchaser of the trust estate, such purchase, although there be no unfair dealing, will be set aside, on the ground that the personal interest of the trustee would interfere with the carrying out of his duties. *Davue v. Faunning*, 2 Johns. Ch. 252 (1816); *Fullon v. Whitney*, 66 N. Y. 548 (1876). In *Scholle v. Scholle*, 101 N. Y. 167 (1886), such disability on the part of the trustee was removed where the court on application permitted the trustee to become the purchaser, at the same time saying, that unless such permission were given, a sale to a trustee could be set aside on behalf of the *cestui que trust*. The principal case, while reaffirming the general doctrine and approving of the Scholle case, goes one step further, in holding that a confirmation of the sale upon a hearing of all the parties, has the same effect as the giving of permission to buy, and that the court "is presumed to have acted consciously in confirming the sale." Such a relaxation of the rule seems unwise as a matter of public policy, for in any case involving a fiduciary relation, the court ought to have all of the facts before it and should give an actual approval to such purchase.

**TORTS—MASTER AND SERVANT—ADMISSIONS AGAINST INTEREST.** The defendant corporation employed one Kaufmann "to look up and see to"



witnesses in a suit by the plaintiff against the corporation. *Held* (three dissenting), evidence that Kaufmann attempted to bribe the plaintiff's witnesses was admissible as tending to show that the defendant's case was weak and his witnesses dishonest. *Nowack v. Metropolitan Street Ry. Co.*, 60 N. E. 32 (N. Y. April, 1901).

By the great weight of authority, such evidence is admissible against a private person, although even if believed it is not conclusive against him. The leading case is *Moriarty v. Ry. Co.*, L. R. 5 Q. B. 314 (1870). This has been generally followed in this country. *Donahue v. People*, 56 N. Y. 208 (1874). There are conflicting decisions as to whether such evidence is admissible against a corporation when no authority was given for the agent's wrongful act. The principal case answers the question in the affirmative, which is in accordance with the weight of authority, and justifiable on grounds of public policy. *Railroad Co. v. McMahon*, 103 Ill. 455 (1882); but see, *contra*, *Green v. Town of Woodbury*, 48 Vt. 5 (1875).

The dissenting opinion is based on the proposition that, although a master is liable for the unauthorized tort of his servant when committed in the course of employment, this doctrine should not be extended to cases where the servant's act does no injury to any one. Without discussing the soundness of this ruling, it would seem to have little direct application to the present case, as the suit was not brought to recover damages for Kaufmann's alleged attempted subornation.

**TORTS—NEGLIGENCE PER SE.** It was *held* not to be negligence for the driver of a gentle horse to leave him untied and unattended on the side of a public highway, while the driver was upon the sidewalk loading goods into the wagon. *Belles v. Kellner*, 48 Atl. 1010 (N. J. April, 1901).

It is generally a question for the jury whether the driver has acted prudently under the circumstances in leaving his horse in a public street. *Southworth v. R. R. Co.*, 105 Mass. 342 (1870). But where the proof is clear that the horse was of a quiet disposition and the driver had no reason to apprehend any injury, the rule of the principal case is applicable. *Wasmer v. R. R. Co.*, 80 N. Y. 212 (1880); *Reed v. Southern Express Co.*, 22 S. E. 133 (Ga. 1894). On the other hand, where the horse is left near a railroad track, as in *Morris v. Kohler*, 41 N. Y. 42 (1869), or near a young shade tree, as in *Lane v. Lamke*, 53 App. Div. 395 (N. Y. 1900), or for an unreasonable time, as in *Lynch v. Nurdin*, 4 P. & D. 672 (1841), there is a *prima facie* case of negligence.

## BOOK REVIEWS.

**THE LAW OF SALES OF PERSONAL PROPERTY.** By Francis M. Burdick. Second Edition, Revised and Enlarged. Boston: Little, Brown & Co. 1901. pp. xii, 299.

**SELECTED CASES ON THE LAW OF SALES OF PERSONAL PROPERTY.** By Francis M. Burdick. Second Edition, Revised and Enlarged. Boston: Little, Brown & Co., 1901. pp. xiii, 792.

Although this is the second edition of Professor Burdick's two books, it is our first opportunity of greeting them, and we do so with great pleasure.

In his *Law of Sales* the author has succeeded in presenting a clear and satisfactory treatment of an important branch of law within a very small compass. This edition contains about a quarter again as much matter as the first, and in it some sixteen hundred odd cases are discussed and their results formulated. All this means great condensation in a book of less than three hundred pages, but so skillfully is the work done that a careful reading leaves no impression of lack of proportion. Reference to many jurisdictions shows the author's care in searching for authorities and induces confidence in his results—a feeling too often lacking in books of this size. But to enumerate the good points of this little book would involve reprinting almost the entire table of contents; this would take space and is better seen at first hand. Deserving of special mention, however, are the two chapters dealing with the Rights and Duties of Buyers and Sellers, which contain unusually lucid expositions of some of the most confusing and unsettled questions of contract law.

It is almost ungracious to notice any faults among so many virtues, but it seems to us that there are two. One is that the Statute of Frauds, in its bearing on the law of Sales, receives only scattered treatment. In the preface to his first edition, the author attributes to this "an economy of space in the book," and "a like economy of time and perplexity on the part of the student." As to the first, he is the best judge, but as to the second we must respectfully differ from him, and express a regret that this edition did not see the matter discussed in a chapter by itself. The other fault is likewise one of arrangement. The book suffers from too much subdivision. From the student's point of view this is a mistake, for it confuses and makes what is really a thoroughly scientific treatment seem oftentimes fragmentary and discursive. To lawyers, of course, subdivision means time saved, and adds to the book's value for reference work.

Appendices containing typical provisions of the statutes of frauds in this country, and what corresponds to them in the French

and German codes, and a good discussion of Factor's acts and their interpretation by the courts, complete a book which is a most valuable contribution to the literature of its subject.

The Selected Cases is a companion book to the Law of Sales and the arrangement is similar. The selection of cases is discriminating and the sins of omission are few. There are no changes in the new edition, save that a supplement is added, containing some forty cases not included in the book as it first appeared.

A COMPILATION OF THE BAR EXAMINATION QUESTIONS OF THE STATE OF NEW YORK, SINCE 1896, WITH ANSWERS, REFERENCES AND NOTES. Edited by Wilson B. Brice. Albany: Matthew Bender. 1901. pp. 229.

If not taken too seriously or relied upon too confidently, this miscellaneous collection of questions and answers may prove of service to aspirants for the New York bar. But it is a paltry service, shabbily performed. Thrown together at haphazard, without rhyme or reason, full of vain repetitions, the same questions appearing again and again, with enough errors in the answers and citations to make the most eager student pause, and enough aberrations in grammar, style and proofreading to make the judicious grieve—the book is one to be used cautiously, if at all, and not to be used at all by any but the trained and practiced student.

But, assuming the work to have been well and not ill done, it may still be questioned whether a reputable member of the bar might not be better employed than in providing a cram-book for the hangers-on of the law schools and the law offices. A quiz-book, searching out and exposing the difficulties of the law in a series of carefully drawn questions, put forth without answers or citation of cases, is one thing. A compilation of bar examination questions which can have no other rational aim than that of furnishing the candidate with the materials of his coming examination, is another and very different thing. At a time when the bench and bar are struggling to raise the standard of legal education, it is a sorry service to the profession to cheapen the law examinations.

The writer of this review has not been created *censor morum* and so he does not venture to pass on the personal or the professional morality of the publication of examination questions which the examiners are, to the best of their ability and for the protection of their work, carefully guarding from public knowledge, and which have been gathered by the learned editor from the random recollections of candidates who have taken the examinations. *Quot homines, tot sententiæ*; but if the State Bar Examiners choose to express their opinion of the matter, and will keep their expression within the bounds of literary decorum, we shall take pleasure in printing it as our sentiments.

If, after all this, any one buys the compilation, he may be comforted to find that the rules of the Court of Appeals relating to the admission of attorneys, as well as the rules regulating law examina-

tions, adopted by the State Board of Law Examiners, for the year 1901, are included in the little volume.

**A DIGEST OF THE NEW YORK CODE OF CIVIL PROCEDURE.** Edited by Chas. W. Disbrow, LL. B. Albany: Matthew Bender. 1901. pp. 151.

To digest the Code is certainly a difficult task. Mr. Disbrow in his second attempt has succeeded in producing a work which should be of service to the student eager to acquire sufficient knowledge of the subject to pass the examination for the Bar. But for any other purpose the book is of little value. It is really more of a guide to the Code than a digest—pointing out the more important sections.

The first chapter, which treats of the different courts throughout the States, is probably the best in the book, and gives a clear and concise explanation of the judicial system of the State. It is followed by chapters treating of the different proceedings in an action, supplementary and special proceedings, arbitration, submission of controversy, provisional remedies, state writs, and the proceedings in the Surrogate's Court. Of these the chapters on State writs and on provisional remedies are the best.

The style throughout is too condensed, and grammatical errors are frequent; but some of these should doubtless be attributed to the compositor, rather than to the author. In fact the typographical work is most careless; a striking example of this is furnished by the third paragraph on page 60. But in spite of these defects, the book is worthy of commendation as tending to lighten the student's burden.

**THE LAW OF AGENCY.** By Ernest W. Huffcut. Second Edition. Boston: Little, Brown & Co., 1901, pp. li, 406.

If every book were as carefully planned, as thoughtfully executed and as well written as the volume now before us, the task of the reviewer would be a pleasant one. Not only is Professor Huffcut's knowledge of his subject full and minute, but it is presented to his readers in a most satisfactory and attractive manner. His analysis of the law of agency is admirable, and every page of the text is characterized by clearness of thought and lucidity of style. In preparing the book, the author has had in mind undoubtedly the average law school student. He has sought to reduce this branch of the law to its simplest terms, to point out its anomalies, to trace its history, to set forth conflicting views, and to account, as far as possible, for the existence of this conflict. While it is preëminently a students' book, we believe that the practicing lawyer will not find it too elementary to be serviceable. On the other hand, he will find it replete with discussion and suggestion not encountered in the ordinary law book, but which will often prove stimulating as well as useful to him. He will discover, also, that the citations are not a hodge-podge of miscellaneous cases, copied from other text

books or from digests, but are carefully selected for their full and authoritative presentation of the doctrines for which they are cited.

The first edition of this work was limited to what the author conceives to be agency proper, and did not deal with the relations of master and servant. In this edition, the whole field of agency, using that term in its ordinary sense, is covered. Accordingly this volume is divided into two books, the first of which presents the law of principal and agent, the second, the law of master and servant. Even Book First, however, which contains the substance of the first edition, has been carefully revised—indeed rewritten to a considerable extent; and Book Second is entirely new.

The author holds that the distinction between the law of principal and agent, and the law of master and servant, is fundamental; that it is disclosed “(1) in the nature of the act authorized, and (2) in the nature of the obligation resulting from the performance of the act, and (3) in the nature of the legal test fixing the constituents’ (the principal’s or the master’s) liability for an act in excess of authority.” Amplifying this statement, he declares that the act which the agent is authorized to do is one which results in the creation of a voluntary primary obligation or undertaking on the part of the principal, while the act which the servant is to do is one which does not result in the creation of a voluntary primary obligation, but may result in the breach of an existing one. In other words the agent’s act generally subjects the principal to a contract liability; while the servant’s act generally subjects the master to a tort liability, if any. Whether it is wise or even practicable to separate the law of master and servant from that of principal and agent, by so wide and deep a gulf as that mapped out by the author, seems doubtful to us. But there can be no doubt of the acumen and ability with which he maintains his views on this, as well as on every other topic in this volume.

**AN EPITOME OF ROMAN LAW.** By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell. 1901. pp. vi, 268.

The requirement of some knowledge of Roman law in the English bar examinations has produced a number of cram books. Mr. Kelke’s is a fair specimen of this sort of book. He has used on the whole, the best literature accessible in English and some of the best French treatises. He is also fairly familiar with the text. His book, by reason of its extreme condensation, contains many statements that would be misleading, and some that would be unintelligible, to a student who had not read fuller treatises or heard lectures. To persons, however, who know something about Roman law, the book will be useful for reference.

**AN EPITOME OF LEADING CASES IN EQUITY FOUNDED ON WHITE AND TUDOR’S SELECTION.** By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell, Limited. 1901. pp. xx, 240.

This is the fourth volume of the series of epitomes which the author has published. With all deference we feel constrained to

say that Mr. Kelke would have performed a greater service for his profession if he had compiled a careful index to White and Tudor's cases. In this age of the digest a text-book which is not scientific in its treatment is a superfluity, and the author of this book has not made clear its justification. It has its good points—notably, very clear statements of many decisions—but how it can be of much aid to a beginner, a hope which its preface expresses, is not obvious. Mr. Kelke's method is largely that of enumeration, which is always cumbersome and unsatisfactory; and any usefulness the book might have in this country is decreased by the fact that many of the cases are discussed in relation to the Judicature Act and other English statutes. The book is also handicapped very greatly by an irritating use of abbreviations and an omission of words, unparalleled save in the other epitomes and in the conversation of the late Mr. Jingle.

**FALSTAFF AND EQUITY: AN INTERPRETATION.** By Charles E. Phelps. Cambridge: Houghton, Mifflin & Co. 1901. pp. xvi, 201.

This little volume, by the learned Baltimore judge whose name it bears, justifies its place in the lawyer's library as well as on the shelf of the student of Shakespere. It is a somewhat elaborate note on Falstaff's exclamation: "An the Prince and Poins be not two arrant cowards, there's no equity stirring" (1 Henry IV; Act II, Sc. 2), showing very clearly, as it seems to the writer, that the term equity was employed by the fat knight in the lawyer's and not the layman's sense of the term. It is a relief to find that "that old white-bearded satan" was not guilty of giving the Gadshill incident such a flat conclusion as the common interpretation of his words has fastened upon him. It is certainly easier to believe, as our author argues, that the words represent a "gag" having reference to the stir which certain notorious equity cases and the high-handed proceedings of Lord Chancellor Ellesmere were at the time creating, than that they have the merely conventional meaning, "there's no justice in the world." For the lawyer, the value of the little book lies in its spirited description of the bitter conflict between the law courts and Chancery and of the way in which justice was administered in the roaring times of Ellesmere, Coke and Popham.

That the commentary is a little too long drawn out would be a graver fault if the commentator had a less animated style; but animation of style is a doubtful virtue when it leads to such excesses as the unclassical phrases, "catch on to his [Falstaff's] curves" (p. 6), "megacephalic deliverance" (p. 78), and "lug in by the ears some 'forged quaint conceit'" (p. 150). In doubtful taste, also, and of more than doubtful value, is the egregiously flattering introduction from the hand of the Judge's Boston friend.

**COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS.** By Seymour D. Thompson, LL. D. Indianapolis: The Bowen-Merrill Company. 1901. pp. li, 1134.

In the second volume of his encyclopædic work, the learned author continues the majestic course, outlined in the preface to the first volume. Railway Negligence is the chief theme here, and that is not concluded; so much of it as relates to carriers of passengers, and to master and servant being reserved for later instalments of these commentaries.

Title ten, with which this volume opens, is devoted to Street Railway Negligence; title eleven, to Injuries to Travelers at Highway Crossings of Steam Railways; title twelve, to Railway Injuries at other Places than Highway Crossings; title thirteen, to Other Personal Injuries in Railway Operation; title fourteen, to Railway Injuries to Animals; and title fifteen, to Railway Fires. It is apparent from this enumeration of topics, that the discussion of Negligence in the present volume does not proceed in accordance with any logical plan. The author strives to be practical rather than scientific. His arrangement enables him to digest decisions and group them under appropriate subheads, with the least effort to himself and to the greatest convenience of the practicing lawyer, but it renders impossible a philosophical presentation of his subject.

That the volume goes far afield of the law of negligence, is frankly confessed, from time to time, in the text. For example, after devoting a couple of pages to the manner in which street railways may acquire the legal right to occupy streets, the author remarks that, notwithstanding the importance of this topic, it lies outside the scope of this work, and he "will content himself by referring to a number of modern cases which have come under his eye, speaking both ways upon the question, under particular facts and circumstances."

It is not to be inferred from these remarks that the author is without fixed opinions upon disputed points, or that he shrinks from expressing them. If the reader has drawn any such inference, let him correct it by perusing the chapter devoted to injuries to children trespassing upon railway tracks or premises, which opens with this sentence: "The doctrine now about to be considered forms a very disgraceful chapter in American jurisprudence."

The lack of logical arrangement already referred to is again displayed by title sixteen, in which the negligence of telegraph companies is fully presented. Why this topic is interposed here, in the midst of a discussion of railway negligence, it is difficult to understand, unless it be that the title chanced to embrace a sufficient number of pages to fill out the volume.

With all its faults of arrangement and of exuberance of information, if there are any such faults, the volume must be accounted an important contribution to legal literature and a most valuable work to the practicing lawyer.

**LAW OF REAL PROPERTY.** By Charles T. Boone. Second Edition. San Francisco: Bancroft-Whitney Co. 1901. 3 vols. pp. xxvii, 612; 631; xiii, 651.

The revision of Boone's Real Property, which comes to us in

the guise of a second edition, is no perfunctory performance. The three seemingly volumes which make up the present work owe not a little to the improved type and the enlarged page in which a repentant publisher has dressed them, but much more to the author's industry, which has more than doubled the matter of the book. Many sections have been interspersed in the body of the work, supplying deficiencies and amplifying here and there the two meager treatment of important topics. A chapter has been added on the Homestead, and ten chapters, constituting the third volume, on the rights and remedies of land-owners.

With all these additions and improvements, however, the work remains substantially unchanged. Not only in form and design, but in its language and citations, it is the same. It will, therefore, continue to perform indifferently well the indifferent service which it has so long rendered to the profession. A bald and unadorned statement of legal propositions, deriving its history from Blackstone and its theory from Coke, giving no reasons, instituting no comparisons, dealing with all decided cases and all printed texts as of equal validity, giving no hint of the transformation through which the law of real property has passed and is passing, nor any intimation of doubtfulness or uncertainty in the doctrines set forth—the work is not one which appeals to the student, or the teacher of law. Its real utility, as a reference book for the busy or the lazy practitioner, would have been materially enhanced by the addition of a table of cases.

Reviews to follow :

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell. Chicago : Callaghan & Co. 1900. pp. xvii, 204.

A SELECTION OF CASES ON THE LAW OF INSURANCE. Edwin H. Woodruff. New York : Baker, Voorhis & Company. 1900. pp. xiii, 591.

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Francis Newton Thorpe. Chicago : Callaghan & Co. 1901. pp. Vol. I, xxi, 595 ; Vol. II, xix, 685 ; Vol. III, xvi, 718.

A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING, with notes. By Charles M. Hepburn. Cincinnati : W. H. Anderson & Co. 1901. pp. xxxvi, 651.

THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT. By Waterman L. Williams, A. B., LL.B. Boston : Little, Brown & Co. 1901. pp. xxxix, 345.

FEDERAL EQUITY PROCEDURE. By C. L. Bates. Chicago : T. H. Flood & Co. 1901. 2 vols. pp. lxii, 599, 600-1409.

A HANDBOOK OF PARLIAMENTARY PRACTICE. By Rufus Waples. Second Edition. Chicago : Callaghan & Co. 1901. pp. xvi, 306.

A TREATISE ON INJUNCTIONS. By Thomas Carl Spelling. Second Edition. Boston : Little, Brown & Co. 1901. pp. clxxii, 821 ; 823-1894.

A TREATISE ON FEDERAL PRACTICE. By Roger Foster. Third Edition. Chicago : Callaghan & Co. 1901. pp. clxxxv, 799 ; xl, 801-1655.

HANDBOOK OF ADMIRALTY LAW. By Robert M. Hughes. St. Paul : West Publishing Co. 1901. pp. xvii, 503.

TWO CENTURIES' GROWTH OF AMERICAN LAW. By Members of the Faculty of the Yale Law School. New York : Charles Scribner's Sons. 1901. pp. xviii, 538.



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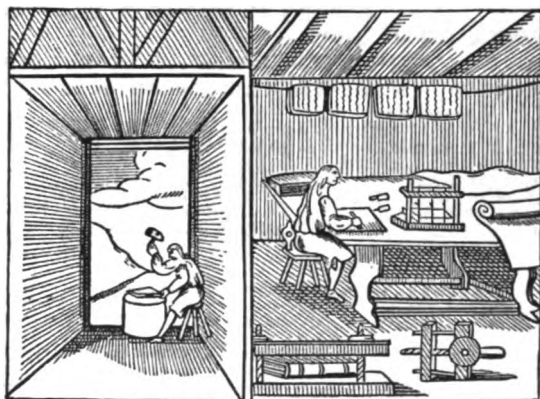
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